Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

GARRETT DOTCH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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April 14, 2011

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CAPITAL CASE

Question Presented

Whether a criminal defendant in a capital case has a Sixth Amendment right to have a jury determine, by a unanimous vote and beyond a reasonable doubt, the existence of all statutory aggravating circumstances on which a death sentence is based?

Table of Contents

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdictional Statement 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. THE LOWER COURTS ARE DIVIDED CONCERNING WHETHER THE SIXTH AMENDMENT REQUIRES THE JURY TO FIND THE EXISTENCE OF ANY AND ALL STATUTORY AGGRAVATING CIRCUMSTANCES WEIGHED DURING SENTENCING. 6

A. The State Courts are Applying Conflicting Interpretations of *Ring* 6

B. Mr. Dotch's Case is the Appropriate Vehicle for Resolving the Split of Authority 9

C. Alabama Has Violated Mr. Dotch's Constitutional Rights by Applying an Unduly Narrow Interpretation of *Ring* 12

Conclusion 14

Table of Contents

Appendix A: *Dotch v. State*, CR-07-1913 (Ala. Ct. Crim. App. April 2, 2010) (affirming conviction and sentence) 1a

Appendix B: *Dotch v. State*, CR-07-1997 (Ala. Ct. Crim. App. June 11, 2010)(denying application for rehearing) 131a

Appendix C: *Dotch v. State* (Ala. Jan. 14, 2011) (denying petition for writ of certiorari)..... 133a

Appendix D: *Dotch v. State*, CR-07-1913 (Ala. Ct. Crim. App. Jan. 14, 2011) (certifying judgment) 135a

Appendix E: *State v. Dotch*, Case No. CC-2007-0788 (Mobile County Circuit Court May 14, 2008) (trial court's oral charge to jury, jury question, and verdict) 137a

Appendix F: *State v. Dotch*, Case No. CC-2007-0788 (Mobile County Circuit Court May 14, 2008) (jury form) 155a

Appendix G: *State v. Dotch*, Case No. CC-2007-0788 (Mobile County Circuit Court July 23, 2008) (sentencing order) 156a

Appendix H: *State v. Dotch*, Case No. CC-2007-0788 (Mobile County Circuit Court Aug. 22, 2008) (motion for new trial)..... 174a

Table of Contents

Appendix I: *State v. Dotch*, Case No. CC-2007-0788 (Mobile County Circuit Court May 13, 2008) (sentencing phase discussion concerning "under sentence of imprisonment" aggravator).....178a

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 2, 4, 5, 6

Blakely v. Washington,
542 U.S. 296 (2004) 12, 13

Brice v. State,
815 A.2d 314 (Del. 2003) 7

Dotch v. *State*,
No. CR-07-1913, 2010 WL 1260162 (Ala. Crim. App. April 2, 2010) 1

Duest v. State,
855 So. 2d 33 (Fla. 2003) 5

Ex parte Hodges,
856 So. 2d 936 (Ala. 2003) 6

Ex parte McGriff,
908 So. 2d 1024 (Ala. 2004) 8

Ex parte McNabb,
887 So. 2d 998 (Ala. 2004) ..... *passim*

Ex parte Waldrop,
859 So. 2d 1181 (Ala. 2002) 3, 9

Ortiz v. State,
869 A.2d 285 (Del. 2005) 6

People v. Montour,
157 P.3d 489 (Colo. 2007) 8

Ring v. Arizona,
536 U.S. 584 (2002) ..... *passim*

Ritchie v. State,
809 N.E.2d 258 (Ind. 2004) 8

State v. Gales,
658 N.W.2d 604 (Neb. 2003) 8

State v. Ring,
65 P.3d 915 (Ariz. 2003) 8

State v. Steele,
921 So. 2d 538 (Fla. 2005) 7

STATUTES

28 U.S.C. § 1257(a) 1

Ala. Code § 13A-5-45(f) 9

Ala. Code § 13A-5-49 ..... 9, 10

Ala. Code § 13A-5-49(1) 3

Ala. Code § 13A-5-49(2) 4

Ala. Code § 13A-5-40(a) 3

Ala. Code § 13A-5-40(a)(14) 3

Ala. Code § 13A-5-40(a)(17) 3, 9

CONSTITUTIONAL AMENDMENTS

Fourteenth Amendment 1, 12

Sixth Amendment ..... *passim*

Petition for a Writ of Certiorari

Petitioner Garrett Dotch respectfully petitions for a writ of certiorari to the Alabama Court of Criminal Appeals in *Dotch* v. *State*, No. CR-07-1913.

Opinions Below

The judgment of the Alabama Court of Criminal Appeals is reported at __ So. 3d __, CR-07-1913, 2010 WL 1260162 (Ala. Crim. App. April 2, 2010) and reprinted at Pet. App. 1a. The court's order denying rehearing is unpublished and reprinted at Pet. App. 131a. The Alabama Supreme Court's order denying discretionary review is unpublished and reprinted at Pet. App. 133a. The trial court's written order sentencing Mr. Dotch to death is reprinted at Pet. App. 156a.

Jurisdictional Statement

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

Petitioner's claim has been properly presented and preserved at all stages below.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in part, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

This is a death penalty case. In *Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000), this Court clarified the respective roles of judge and jury in criminal sentencing, holding that the Fourteenth Amendment requires that any fact that increases a crime's penalty beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be found by a jury and proved beyond a reasonable doubt.

In *Ring v. Arizona,* 536 U.S. 584 (2002), the Court made clear that *Apprendi* applies to death penalty sentencing schemes, holding that "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

When *Ring* was decided, Alabama was one of four States employing a "hybrid" capital sentencing scheme, whereby "the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Id.* at 608 n.6. Alabama continues to employ that scheme today. In the face of repeated *Ring* challenges, the Alabama courts have relied largely on a "double-counting" rationale to support the constitutionality of judge-imposed death sentences, reasoning that whenever an element of a capital offense "overlaps" with one or more of the

statutory aggravating factors necessary to render a defendant death-eligible, then the jury's guilty verdict in and of itself supports imposition of the death penalty by the trial judge. *See Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002).

This, however, is a case in which the "double-counting" rationale does not apply. On November 21, 2006, Petitioner Garrett Dotch was indicted by a Mobile County grand jury on two counts of capital murder, in connection with the shooting death of Timarla Taldon. On May 13, 2008, he was found guilty of capital murder under Alabama Code Section 13A-5-40(a)(17) – murder committed by or through the use of a deadly weapon while the victim is in a vehicle.[1] It is indisputable that the elements of this capital offense do not overlap with any of the aggravating factors set forth in statute at Alabama Code Section 13A-5-40(a). Accordingly, the jury's verdict of guilt did not encompass a finding, unanimously and beyond a reasonable doubt, of any statutory aggravating circumstances.

During the sentencing phase of Mr. Dotch's trial, the State proffered two statutory aggravating circumstances for the jury's consideration: (1) that Mr. Dotch was under a prior sentence of imprisonment at the time of Ms. Taldon's death, Ala. Code § 13A-5-

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[1] Mr. Dotch was acquitted of the charge under Alabama Code Section 13A-5-40(a)(14) – murder stemming from, caused by, or related to the capacity or role of the victim as a witness in any preliminary hearing, grand jury proceeding, and/or criminal or civil proceeding of whatever nature.

49(1); and (2) that Mr. Dotch had been previously convicted of a felony that involved the use or threat of violence to a person, Ala. Code § 13A-5-49(2).[2]

On May 14, 2008, the jury returned an advisory verdict recommending, by a non-unanimous vote of 10-2, that Garrett Dotch be sentenced to death. The verdict form does not identify which (if either) of the two statutory aggravating circumstances was found by the jury to exist beyond a reasonable doubt, or whether such a finding was by unanimous vote. Pet. App. 155a.

Following receipt of the jury's advisory verdict, the decision whether Mr. Dotch should receive a death sentence rested solely with the trial judge. On July 23, 2008, the Hon. Roderick P. Stout imposed a

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[2] Although each of these aggravating circumstances relates to Mr. Dotch's prior convictions, the first also involves consideration of facts *in addition to* the "fact" of his prior conviction. For example, the trial record reflects that witness testimony was necessary in order to support the State's contention that Mr. Dotch remained under sentence of imprisonment at the time of his capital offense because there was an issue of whether his three-year sentence from March 2002 had fully run by the time of Ms. Taldon's death in July 2006, or whether the running of the sentence had been tolled. *See* Pet. App. 178a. Accordingly, Mr. Dotch contends that the "prior conviction" exception to the *Apprendi* line of cases is not implicated here. (Nor was it relied on by the Alabama Court of Criminal Appeals in affirming his conviction and sentence.) The jury could reasonably have found that at least one of the aggravating circumstances did not apply – yet the judge "weighed" both in making his sentencing determination.

sentence of death on Mr. Dotch, issuing written findings that both of the statutory aggravating circumstances put forward by the State had been proved beyond a reasonable doubt and that these aggravating circumstances outweighed mitigating circumstances. Pet. App. 156a.

Mr. Dotch unsuccessfully moved for a new trial, arguing, *inter alia*, that "the Alabama capital sentencing scheme is unconstitutional under *Ring v. Arizona*, specifically in that it does not require the jury to find unanimously the facts supporting a capital sentence." Pet. App. 175a.

On April 2, 2010, the Alabama Court of Criminal Appeals upheld the conviction notwithstanding Mr. Dotch's arguments that the Alabama capital sentencing scheme violates *Apprendi* and *Ring*. Pet. App. 1a. On June 11, 2010, the criminal appeals court denied Mr. Dotch's motion for rehearing, without opinion. Pet. App. 131a. On January 14, 2011, the Alabama Supreme Court denied Mr. Dotch's timely petition for a writ of certiorari, without opinion. Pet. App. 133a.

Reasons for Granting the Writ

It has been observed that "*Ring* has raised at least as many questions in the state courts as it has answered." *Duest v. State*, 855 So. 2d 33, 51 (Fla. 2003) (Pariente, J., concurring). As discussed below, Mr. Dotch's case squarely presents the Court with the opportunity to resolve a conflict among the State supreme courts concerning the nature and scope of the jury's role in death penalty sentencing.

I. THE LOWER COURTS ARE DIVIDED CONCERNING WHETHER THE SIXTH AMENDMENT REQUIRES THE JURY TO FIND THE EXISTENCE OF ANY AND ALL STATUTORY AGGRAVATING CIRCUMSTANCES WEIGHED DURING SENTENCING.

A. The State Courts are Applying Conflicting Interpretations of *Ring*.

There is a split among the state courts concerning the role of the jury in determining the existence of statutory aggravating circumstances relied on to impose a death sentence. The Supreme Courts of Alabama, Delaware, and Florida[3] have held that a jury finding that *any* statutory aggravating factor exists is sufficient to satisfy *Ring* and render a criminal defendant death-eligible, even if the sentencing judge independently finds and weighs additional aggravators before imposing death. *See Ex parte McNabb*, 887 So. 2d 998, 1006 (Ala. 2004) (holding that "[t]he jury's unanimous finding of one aggravating circumstance is sufficient to satisfy *Ring*"); *Ex parte Hodges*, 856 So. 2d 936, 944 (Ala. 2003) (holding that the jury's finding of one aggravating circumstance is sufficient to satisfy *Ring* even if the trial judge goes on to find and weigh additional aggravators); *Ortiz v. State*, 869 A.2d 285, 305 (Del. 2005) ("Ortiz became death-eligible under *Apprendi* and *Ring* when the jury unanimously found beyond a reasonable doubt

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[3] All three States use "hybrid" death penalty sentencing schemes.

the existence of *one* of the statutory aggravating circumstances alleged by the prosecution. . . .") (emphasis added); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) ("*Ring* does not . . . require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence."); *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) (holding that requiring the jury to consider each particular aggravator submitted by the State "rather than merely specifying whether one or more aggravators exist" would impose a "greater burden than the one the Supreme Court imposed [in *Ring*]").

Indeed, the Supreme Court of Alabama has gone so far as to hold that in cases where the jury recommends death by a *non-unanimous* vote (as happened in Mr. Dotch's case), it suffices under the Sixth Amendment to presume that, at some point in its deliberations, the jury must have unanimously found the existence of at least one aggravating circumstance beyond a reasonable doubt – regardless of whether it is possible to ascertain from the record *which* aggravator was found to exist. *See Ex parte McNabb*, 887 So. 2d at 1005 (rejecting *Ring* challenge where the jury considered three aggravating circumstances before rendering a 10-2 general advisory verdict that did not contain specific findings with regard to aggravators); *see also Steele*, 921 So. 2d at 545 (holding that *Ring* does not require a jury "to agree on *which* aggravating circumstances exist.") (emphasis in original).[4]

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[4] The Alabama Supreme Court's rationale is that even a non-unanimous death recommendation by the jury is sufficient

In contrast, the Supreme Courts of Arizona, Colorado, Indiana, and Nebraska have held that *Ring* requires a jury finding with respect to *all* aggravating circumstances weighed during capital sentencing. *See State v. Ring*, 65 P.3d 915, 943 (Ariz. 2003) ("[W]e conclude that [*Ring*] requires a jury to consider all aggravating factors urged by the state and not either exempt from [*Ring*], implicit in the jury's verdict, or otherwise established beyond a reasonable doubt."); *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007) ("Capital defendants have a right to a jury trial on all aggravating facts used to determine death eligibility."); *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004) ("The Supreme Court has now made clear that statutory aggravators . . . are the functional equivalent of elements of a crime, and must be found by a jury beyond a reasonable doubt."); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003) ("[I]n order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of [a death sentence], other than a prior criminal conviction, must be determined by a jury.") (internal references omitted).

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proof of a unanimously finding of at least one aggravating circumstance, because Alabama jurors are instructed "not [to] proceed to a vote on a death recommendation unless they ha[ve] unanimously agreed on the existence of at least one aggravating circumstance." *Ex parte McGriff*, 908 So. 2d 1024, 1038-39 (Ala. 2004) (discussing the *McNabb* holding).

Respectfully, this conflict among the state courts concerning a fundamental constitutional right is worthy of the Court's review.

B. Mr. Dotch's Case is the Appropriate Vehicle for Resolving the Split of Authority.

Mr. Dotch's case squarely presents the issue of which of the conflicting lines of State supreme court authority is correct. Although his sentence has been upheld based on Alabama's interpretation of the relevant legal standard, his death sentence would be unconstitutional under the competing line of State supreme court decisions. His case therefore affords this Court the opportunity to resolve the conflict in the cases.

Mr. Dotch's case squarely presents the question because the following facts are not subject to dispute:

- Mr. Dotch was not automatically eligible for a death sentence upon his conviction of a capital offense. The State was required to prove the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. *See Ex parte Waldrop*, 859 So. 2d at 1187; Ala. Code § 13A-5-45(f) ("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.").

- There was no "overlap" between the elements of Mr. Dotch's capital offense and any of the aggravating circumstances set forth in Alabama statute. *Compare* Ala. Code § 13A-5-

40(a)(17), *with* Ala. Code § 13A-5-49. Thus, Mr. Dotch could not be sentenced to death unless, during the sentencing phase of his trial, the jury unanimously found that the existence of "at least one aggravating circumstance" had been proven beyond a reasonable doubt. *See Ex parte McNabb*, 887 So. 2d at 1004-06.

- The State submitted *two* aggravating circumstances for the jury's consideration during the sentencing phase of Mr. Dotch's trial. Pet. App. 137a (Jury Instructions, Sentencing Phase).

- The jury recommended death by a vote of 10-2. In making that recommendation, the jury executed a general verdict form that simply tallied the number of jurors for and against death, without recording any vote concerning the existence of the two statutory aggravating circumstances proffered by the State. Pet. App. 155a. Consequently, even if it is presumed that the jury unanimously agreed on at least one aggravating circumstance before rendering its non-unanimous advisory verdict, it is impossible to tell *which* one.

- Nonetheless, the trial court imposed a death sentence on Mr. Dotch after independently finding that *both* aggravating circumstances had been proven beyond a reasonable doubt, and that these circumstances outweighed any mitigating circumstances.

- The Alabama appeals court upheld Mr. Dotch's death sentence as *Ring*-compliant, presumably on the rationale set forth by the Alabama Supreme Court in *Ex parte McNabb*. *See supra* n.3.

On these facts, Mr. Dotch's death sentence can survive scrutiny under the Sixth Amendment only if the Supreme Courts of Arizona, Colorado, Indiana, and Nebraska are wrong. If those courts have the better reading of *Ring* – that it is for the jury alone to determine the existence of *all* aggravating circumstances that are weighed during sentencing – then Mr. Dotch's death sentence must be set aside, because there is no indication in the record that *both* of the aggravating circumstances weighed by the trial court during his sentencing had been found to exist by the jury, unanimously and beyond a reasonable doubt.

By contrast, the Supreme Courts of Alabama, Delaware, and Florida hold that the jury's role in death penalty sentencing after *Ring v. Arizona* is merely that of a gate-keeper, *i.e.*, the jury merely determines whether *any* aggravating circumstance exists – even if the jury does not identify which one – such that the defendant is rendered death-eligible. This is a sharp conflict with the other line of decisional authority, and the constitutionality vel non of Mr. Dotch's death sentence turns on the question of which line is correct.

Accordingly, Mr. Dotch's case provides a clean and simple framework for resolving conflicting interpretations of the Sixth Amendment among the

States, and bringing much-needed clarity to the role of the jury in death penalty sentencing, particularly in those "hybrid" States that continue to leave the ultimate decision whether the defendant should live or die solely to a judge.

C. Alabama Has Violated Mr. Dotch's Constitutional Rights by Applying an Unduly Narrow Interpretation of *Ring*.

Finally, this case warrants review because the unduly narrow interpretation of *Ring* under which the Alabama trial and appellate courts upheld Mr. Dotch's conviction violated his rights under the Sixth Amendment (applicable to the States through the Fourteenth Amendment).

The interpretation of *Ring* reflected in Alabama's jurisprudence (and that of Delaware and Florida) boils down to an assertion that as long as a jury has found *any* aggravating circumstance to exist – even one that cannot be identified with specificity in the record – then the trial court is free to find additional aggravators, weigh them against mitigating circumstances, and impose a death sentence. This reduces the jury's role in sentencing to that of a "gatekeeper" rather than a "fact-finder."

Such a result cannot be reconciled with this Court's precedents, particularly in light of *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Court clarified that the "statutory maximum" sentence a judge may impose for *Apprendi/Ring* purposes is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he

may impose *without* any additional facts." 542 U.S. at 303-04 (emphasis in original). In considering aggravating circumstances that go beyond those established by "the jury's verdict alone," a judge exceeds her authority. *Id.* at 304; *see also id.* at 306 ("[T]he judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.").

In short, the precedents of this Court establish that a sentencing judge cannot "weigh" any aggravating circumstance unless that aggravating circumstance has been found to exist by a jury unanimously and beyond a reasonable doubt. Mr. Dotch was sentenced to death under a framework that unlawfully departs from that standard. Accordingly, the Court should grant certiorari to protect Mr. Dotch's constitutional rights and clarify that it is for the jury – not the sentencing judge – to determine the existence of *any and all aggravating circumstances* relied on to impose death.

Conclusion

For the reasons above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: *Dotch v. State*, CR-07-1913 (Ala. Ct. Crim. App. April 2, 2010) (affirming conviction and sentence) 1a

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APPENDIX A

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 2009-2010

CR-07-1913

Garrett Dotch

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-07-788)

MAIN, Judge.

Garrett Dotch appeals his conviction for capital murder for the intentional murder of Timarla Taldon by the use of a deadly weapon while she was in a vehicle, in violation of § 13A-5-40(17), Ala. Code 1975, and his resulting sentence of death. Dotch was indicted for two counts of capital murder: for intentionally killing Taldon by the use of a gun while she was in a vehicle, § 13A-5-40(a) (17), Ala. Code 1975; and for intentionally killing Taldon by shooting her when she was or had been subpoenaed to testify, or had testified in a criminal trial or proceeding, and the murder stemmed from, was caused by, or was related to her role as a witness. § 13A-5- 40(a) (14), Ala. Code 1975. The jury found Dotch guilty as to the first count of the indictment and not guilty as to the second count. In the sentencing phase of Dotch's trial, the members of the jury, by a vote of 10-2, returned an advisory verdict of death in favor of life without

parole. A separate sentencing hearing was then held before the trial court, and the judge accepted the jury's recommendation and sentenced Dotch to death.

The State's evidence showed the following. Dotch and Taldon attended middle school together and began a dating relationship. Subsequently Taldon moved from her parent's home and rented an apartment; Dotch lived with her until their relationship ended in 2002. (R. 964, 975.) Dotch had dropped out of school at the age of sixteen, but Taldon had completed high school and was attending college at the time of her death.

On September 1, 2003, Lt. Stephanie Smith of the assaults units of the Mobile Police Department testified that she responded to a call at Taldon's apartment concerning a burglary complaint. She stated that the door to the apartment had been splintered and "kicked in." (R. 817.) She testified that Taldon had suffered bruising to her right eye and that there was blood inside her eye. (R. 817.) Dotch was arrested and pleaded guilty to first-degree burglary and third-degree assault. (R. 818-19.) He was sentenced to 15 years on each conviction, the sentences to be served concurrently. The sentences were split and the time of incarceration was set at time served, and he was placed on 5 years' probation. (C. 641.)

Taldon's mother testified that after the burglary, Taldon purchased a gun. (R. 964-66.) In May 2005, while on probation for the burglary and assault corrections, Dotch was arrested for third-degree domestic violence against Taldon and he again pleaded guilty. (C. 646, R. 835-36.) The Mobile municipal court sentenced him to 180 days, the sentence to run concurrently with the sentences for his other charges.

After serving that sentence, Dotch was released to continue his probation for the previous offenses.

From the end of May 2006 until July 1, 2006, Taldon lived with her parents, although she continued to pay rent for her apartment. (R. 967.) Taldon's mother then spent the week following July 1 with her daughter at her apartment. She testified that Dotch telephoned Taldon many times while she was there, although Taldon did not want to talk to him and asked him to leave her alone. (R. 968-69.) When Taldon's mother left the apartment on July 8, 2006, two of Taldon's cousins remained with her at her apartment. (R. 968, 949.)

Taldon's cousin, Jiquisa Thomas, testified that during the first week of July 2006 she was present when Dotch telephoned Taldon approximately 20 times. (R. 950.) In the early morning of Sunday, July 9, 2006, at approximately 2:00 a.m. or 3:00 a.m., she was present at the apartment with her sister, Taldon, and Taldon's current boyfriend. Someone began knocking loudly at the door, and Thomas saw Dotch standing outside the apartment. (R. 951.) Thomas knocked on Taldon's bedroom door and told her that Dotch was at the door. When Taldon went to the door, Dotch attempted to force his way inside, and Taldon tried to shut the door to keep him out. Taldon successfully shut the door, and Dotch left. (R. 952.) Later in the morning, he returned and tried to get Taldon to leave her apartment, stating that he needed to talk to her and that he had placed money for her under her car. (R. 953.) Taldon told him to leave and that she was calling the police. Dotch left before the police arrived. (R. 953-54.)

Also on July 9, 2006, Dotch telephoned Taldon, and Taldon put him on a three-way call that included her mother. Taldon's mother testified that Dotch did not know that she was listening to the conversation. She stated that she heard him curse Taldon and tell her that he was going to kill her. (R. 971-72.) He also made disparaging remarks about Taldon's current boyfriend. (R. 973.) When Taldon's mother told him to leave her daughter alone, Dotch hung up. Taldon's mother testified that Dotch continued to telephone her daughter and that she instructed Taldon to call the police. (R. 973.) Cellular telephone records indicate that Dotch called Taldon 51 times on that day.

On July 10, 2006, at 9:35 a.m., according to Dotch's cell phone records, he telephoned the Subway sandwich shop where Taldon worked. Willie Rodgers, a co-employee of Taldon's, testified that Taldon routinely parked behind the sandwich shop, as she did on the day of the offense. He testified that he believed that something was wrong with Taldon on that day because of her behavior. However, despite their usual routine, at the close of her shift, he did not walk her to her vehicle. (R. 682.) He testified that she left early while he was in the restroom. A woman from the McDonald's fast food restaurant adjacent to the sandwich shop ran into the sandwich shop, alerting the occupants that something had occurred, and he ran out to the parking lot where he found Taldon dead in her vehicle. (R. 683.) Rodgers testified that Taldon's right hand was in her purse between her legs, resting on a gun. (R. 684.) The driver's side front door was open and her left hand and left leg were out of the vehicle, and the vehicle was in reverse. (R. 683, 689-90.) Rodgers testified that he and a co-employee carried Taldon into the sandwich shop and laid her on the floor. (R. 684.) Emergency

personnel soon arrived and declared Taldon dead. (R. 688.)

Tracy Sayer testified that she was at the drive-through of the McDonald's restaurant at the time of the offense. She testified that she heard three "successive pows that sounded like gunshots, coming from the direction of the Subway restaurant area, like in the parking lot." (R. 693.) She then saw a man running at a "trot" from the parking lot and that "there appeared to be something—it was black, kind of like a gun at this person's side holding it still." (R. 693-94.)[1] She described the man both in her statement[2] and at trial as dark-skinned with short, bushy hair, tall and of medium build. (R. 694.) She testified that he was wearing a white T-shirt and long, dark blue denim shorts. (R. 694.)

Sayer was shown a photographic array at the Subway sandwich shop immediately following the incident, which included the full faces of six men. (R. 698.) She informed the officer that she was not "one hundred percent sure" that the perpetrator's photograph was in the array. (R. 699.) She informed the officer that she had seen "more or less a profile of the face" or the right "side of the body" of the man as he ran away. (R. 698-99.) Therefore, Sayer told the officer that she would feel more comfortable making the identification if she could see the "profile versus a full face." (R. 700.)

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[1] On cross-examination, Sayer admitted that she had never mentioned any gun or what might have been a gun to the police when she gave her statement to them. (R. 697.)

[2] Her statement was taken approximately an hour after Taldon's body had been found. (R. 695.)

Around 9:00 or 10:00 p.m., she was shown a second photographic array, which consisted of the right profiles of six men. (R. 700-01.) She identified the photograph of Dotch from the array. (R. 701.) At trial, Sayer identified Dotch as the man she had seen "trotting" away from the vehicle in which Taldon's body was found. (R. 695.)

Brittany Slack, an employee of the McDonald's restaurant, testified that she was working at the second drive-through window at the time of the offense. (R. 707.) She testified that she heard gunshots and that after the third shot, she saw someone standing by the side of a vehicle. (R. 707.) Slack described the man as dark-skinned, between 20 and 26 years old, medium height, with a "low haircut." (R. 707.) She stated that he was wearing a "white shirt and dark blue jean shorts." (R. 708.) She testified that she saw him shoot at the vehicle and then run behind the McDonald's restaurant. (R. 708.)[3] The officers showed her a photographic array at the McDonald's restaurant and she tentatively identified Dotch as the man she had seen. (R. 710.)

Later, the police brought her a single photograph depicting the profile of Dotch and she positively identified him as the man she had seen in the parking lot. (R. 710.) Slack also identified Dotch at trial as the man that she had seen. (R. 708.)

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[3] On cross-examination, when asked why she had never told the police that she had seen the man shoot into the vehicle, Slack maintained that she had told someone what she had seen but that she was uncertain whether it had been written down. (R. 713-14.)

Brandi Moore testified that she was working at the first drive-through window of the McDonald's restaurant at the time of the offense. (R. 721.) She testified that she saw a woman walk to a vehicle in the parking lot of the Subway sandwich shop; a man approached the woman. Moore stated that she saw the man and woman talking, and then the woman got into the vehicle. Moore heard three gunshots and saw the man run behind the McDonald's restaurant. (R. 722-23.) She described the man as African-American, in his "early to mid 20s," with a "low" haircut, approximately 5'6" to 5'8" tall, and as having a medium complexion. (R. 722.) She also stated that he was wearing a white shirt and blue-jean shorts. (R. 722.)

Moore also testified that, after the shots, the vehicle rolled into a truck. (R. 724.) The occupant's "legs was (sic) hanging out of the car and the door was opened." (R. 724.)

The following day, she was shown a photographic array and tentatively identified Dotch as the man whom she had seen. (R. 723, 726-27.) In court, she identified Dotch as the man she saw in the parking lot. (R. 723.)

Bonita Lynn Gregg testified that she was in line at the first window of the drive-through of the McDonald's fast-food restaurant at the time of the offense and she heard what she believed was a "car backfiring." (R. 734.) She stated that she heard three "bangs" and that she saw a man running from the direction of the Subway sandwich shop toward the back of the McDonald's restaurant. (R. 734-35.) She described him as an African-American man "in his 20s" and believed that he was wearing shorts and that they were blue and red. (R. 735.)

When she looked to determine the source of the noise, she saw a vehicle behind the Subway sandwich shop slowly start rolling and hit a parked vehicle. (R. 736.) She stated that the driver's door was open and that what appeared to be a foot was hanging out of the door. (R. 736.) As soon as possible, she drove to the vehicle, went to the opened door and attempted to determine if the injured occupant had a pulse; she could not find one. (R. 737.) Gregg was shown a photographic array and was unable to identify anyone as the man she had seen running in the parking lot. (R. 737.)

The following day, Dotch's father drove him to the police station in Mobile where he gave a statement followed immediately by a second statement. (R. 934-35.)

The State introduced evidence indicating that Taldon sustained gunshot wounds to her left chest, the outer part of her arm, her left collarbone, and adjacent to her neck. (R. 994.) The first two wounds were fatal. (R. 1001.) Two shell casings were found in the vehicle and two were on the pavement outside the vehicle. Three bullets were also found in the vehicle: one in the console, one in the front passenger's seat, and one on the rear right floorboard. (R. 744-48.) The three bullets were fired from the same hand gun, and the four casings were fired from the same hand gun; however, without the gun, the expert was unable to determine whether the same gun discharged both the bullets and the casings. (R. 877.) A palm print found on the driver's window matched Dotch's left palm print. (R. 787.) Additionally, bloodstains were found on the driver's seat. (R. 946.)

Dotch introduced expert-and lay-witness testimony that he was mentally ill[4] and was unable to appreciate the nature and quality of his actions at the time of the offense. (R. 1120.) The State presented rebuttal testimony from another expert who opined that Dotch showed no indication of any difficulty that would have prevented him from understanding and appreciating his actions, other than that associated with the voluntary use of cocaine. (R. 1212.)

I.

Dotch argues that the trial court erred by improperly admitting what he says was unreliable identification testimony based on impermissibly suggestive police-identification procedures. Specifically, Dotch contends that the admission of the identification evidence from the three witnesses was erroneous because of the improper conduct and procedures by the police and the unreliability of the witnesses' identifications at the time of the offense. He therefore alleges that the witnesses' in-court identifications were inadmissible.

Dotch argues that improper and suggestive procedures by the police resulted in his identification as the perpetrator of the shooting by three witnesses who were present at the crime scene. He argues different improprieties as to each of the witnesses.

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[4] Dotch's expert testified that Dotch suffered from delusional disorder of an unspecified type; polysubstance abuse; and personality disorder, not otherwise specified, with antisocial, schizoid, paranoid, and borderline features. (R. 1111.)

A.

As to Brittany Slack, an employee at the McDonald's fast-food restaurant located next to the Subway sandwich shop, Dotch argues that the police should not have shown her a single photograph after she failed to make a positive identification in the original photographic array; that the photographic array consisted of photographs that were insufficiently similar to each other or to Slack's description; and that the presence of an officer during the identification procedure was unduly coercive.

Although the use of a single photograph for purposes of identification raises the question of possible suggestiveness, it "does not necessarily inject prejudice." *Hutchinson v State*, 516 So. 2d 889, 894 (Ala. Crim. App. 1987), *citing United States v. Baxter*, 492 F. 2d 150 (9th Cir.), *cert. dismissed*, 414 U.S. 801, (1973), cert. denied, 416 U.S. 940, (1974); *Kalmbach v. Jones*, 488 F. 2d 134 (5th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974). "Although a one-man showup is inherently suggestive, 'it does not necessarily follow that the procedure [is] unduly suggestive so that it would taint [a] subsequent in-court identification.' *Quarles v. State*, 711 So. 2d 1115, 1117 (Ala. Crim. App. 1997). *See also Nichols v. State*, 624 So. 2d 1328, 1338 (Ala. Crim. App. 1992) (although one-man showups 'are by their nature suggestive, they are not necessarily unduly so'), and *Cooley v. State*, 439 So. 2d 193, 195 (Ala. Crim. App. 1983) ('the mere fact that the appellant was subjected to a one-man showup does not necessarily render that identification procedure impermissibly suggestive')." *Gavin v State*, 891 So. 2d 907, 960 (Ala. Crim. App. 2003), *cert. denied, Ex parte Gavin*, 891 So. 2d 998 (Ala. 2004), *cert. denied, Gavin v Alabama*, 543 U.S. 1123 (2005).

"In *Ex parte Appleton*, [828 So. 2d 894 (Ala. 2001),] this Court noted:

> "'"The danger inherent in a one-man showup, where a witness is shown a single suspect and asked, 'Is that the man?' is twofold. First, a one-man showup conveys a clear message that 'the police suspect this man.' Second, a one-man showup does not give the witness a choice of identifying another person as being the perpetrator of the crime charged. Consequently, when a one-man showup is used to identify the perpetrator of a crime, the reliability of the witness's identification is not put to an objective test, such as a live or photographic lineup, in which a single suspect must be chosen from a group of persons possessing similar physical characteristics."'

"828 So. 2d at 899-900 (quoting *Ex parte Frazier*, 729 So. 2d at 254-55 [(Ala. 1998)] (citations omitted) (emphasis omitted))."

Ex parte Wimes, 14 So. 3d 131, 138 (Ala. 2009).

Courts have determined [a single photograph] an identification based on lies in the fact that "the reliability of the witness's identification is not put to an objective test, such as a live or photographic lineup, in which a single suspect must be chosen from a group of persons possessing similar physical characteristics." *Ex parte Frazier*, 729 So. 2d 253, 254-55 (Ala. 1998). Here, however, Slack was originally shown a six-man photographic array from which she tentatively identified Dotch. Thus, her identification had already been put to an objective test.

Moreover, despite the danger in the reliability of an identification of a perpetrator from a one-man showup, "'it is permitted where conducted promptly after the commission of a crime or demanded by necessity, emergency or exigent circumstances.' *Brazell v. State*, 369 So. 2d 25, 29 (Ala. Crim. App. 1978), *cert. denied*, 369 So. 2d 31 (Ala. 1979)." *Ex parte Appleton*, 828 So. 2d 894, 899 (Ala. 2001). Here, Slack testified that she was shown the six-man photographic array immediately after the offense and that she was shown the single photograph "not over ten minutes" later. (R. 710, 712.) Agent Ben Kinsey, of the Mobile Police Department, testified that the officers learned the name of the suspect at the scene of the offense and called the police station where the array was assembled. (R. 919.) It was then delivered to the scene, where it was shown to Sayer and Slack. (R. 919, 920.) Agent Kinsey also stated that the first photographic array was composed of frontal pictures and that from that array Slack tentatively identified Dotch as the perpetrator. Slack informed Agent Kinsey that, because she was standing in the McDonald's restaurant drive-through window, she saw only a profile as the man passed by her. (R. 920.) Agent Kinsey then showed her the single picture of Dotch in profile, and she positively identified Dotch. (R. 920.)

Dotch further alleges impropriety concerning the identification procedures used by the police, specifically as to the composition of the photographic array originally shown to Slack. Dotch argues that the array included photographs of men with varying skin tones and builds. He also argues that all the photographs in the array did not match the witnesses' descriptions of the perpetrator because the witnesses all stated that the perpetrator had short

hair, but one of the men in the photographic array was bald.

A review of the six frontal pictures in the photographic array reveals that all six men had similar features, builds, and skin tones. They appear to be of the same age group, and the background is the same in all of the photographs. (State's Exhibit 82, C. 708.) Moreover, although one of the men is bald, the other five have short hair.

"'On the whole, the physical appearance of [Dotch] is not so dissimilar to that of the other line-up participants that it renders the line-up unduly suggestive.' *Jones v. State*, 450 So. 2d 165, 170 (Ala. Crim. App. 1983), *aff'd*, 450 So. 2d 171 (Ala. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 232, 83 L.Ed.2d 160 (1984)." *Burgess v. State*, 827 So. 2d 134, 170 (Ala. Crim. App. 1998), *affirmed, Ex parte Burgess*, 827 So. 2d 193 (Ala. 2000), *cert. denied, Burgess v. Alabama*, 537 U.S. 976 (2002). *See Hunter v. State*, 802 So. 2d 265, 271-72 (Ala. Crim. App. 2000), *cert. denied*, 802 So. 2d 273 (Ala. 2001) (holding that although the backgrounds in three of the six photographs in the array was a lighter shade of gray and Hunter was the only man in a striped shirt, the lineup was not unduly suggestive); *Burgess v. State*, 827 So. 2d 134 at 169-170 (holding that the photographic array was not unduly suggestive although Burgess was the only man wearing a windbreaker and was the only man standing against a blank wall and his photo was the most recent); *Elston v. State*, 687 So. 2d 1239, 1241 (Ala. Crim. App. 1996) (holding that the photographic lineup was not impermissibly suggestive because other men in the lineup were of similar appearance and, although Elston's photograph was folded or mutilated and imperfectly developed,

the other photographs were also defective); *Childers v. State*, 339 So. 2d 597, 599-600 (Ala. Crim. App.), *cert. denied*, 339 So. 2d 601 (Ala. 1976) (holding that although a witness identified the suspect in a robbery of a convenience store as wearing a red sleeveless shirt, and Hunter was the only participant in the lineup wearing a red sleeveless shirt, there was no likelihood of misidentification).

Dotch also argues that the police officer's presence during Slack's identification was unduly suggestive. He contends that the officer's presence during the 10- to 15- minute period when she viewed the photographic array resulted in coercive pressure because of Slack's age-she was 15 years old. Dotch cites to no evidence or specific facts indicating any such pressure.

> "'Pre-trial identifications are to be set aside on grounds of prejudice only if the pre-trial identification procedure is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Scott v. State*, 479 So. 2d 1343 (Ala. Crim. App. 1985). The totality of the circumstances surrounding the out-of-court identification need be analyzed only when the pre-trial procedures used were unnecessarily or impermissibly suggestive. *Coleman v. State*, 487 So. 2d 1380 (Ala. Crim. App. 1986). The fact that witnesses are shown photographs does not establish suggestiveness. *Matthews v. State*, 401 So. 2d 241 (Ala. Crim. App. 1981), *cert. denied*, 401 So. 2d 248 (Ala. 1981).'
>
> "Ex parte Stout, 547 So. 2d 901, 904 (Ala. 1989)."

Musgrove v. State, 638 So. 2d 1347, 1351 (Ala. Crim. App. 1992), *affirmed, Ex parte Musgrove*, 638 So. 2d

1360 (Ala. 1993), *cert. denied*, *Musgrove v. Alabama*, 513 U.S. 845 (1994). Slack's age raises a question of weight to be accorded her identification by the trier of fact. *Cf. Bradley v. State*, 337 So. 2d 47, 50 (Ala. Crim. App. 1976) (finding that the young age of a 17-year-old defendant "does not in and of itself require a rejection of a confession otherwise admissible").

Here, there is no indication that the officer's mere presence during Slack's viewing of the photographs resulted in any coercion that resulted in a substantial risk of misidentification. *Jackson v. State*, 361 So. 2d 1152, 1154 (Ala. Crim. App. 1977). Slack testified that when she was shown the photographic array, the police officer who was present made no suggestion to her as to who she should pick from the photographs (R. 166, 717) or that she had to pick any photograph from the array. (R. 167, 179.)

Further, there is no indication that Slack's young age would have caused the officer's presence to somehow suggest the identification of Dotch's photograph. There was no evidence of coercion or suggestiveness by the officer. The witness was mature enough to be employed, and her testimony demonstrates that she was certain of her identification. There is no indication that her age was a factor in her identification of Dotch or that in any way caused her identification to be unreliable.

Moreover, even if the procedures used by the police in this case had been improper, Slack's identification was reliable under the factors enumerated in *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

> "'In determining the constitutional adequacy of pretrial identification procedures and the

admissibility of identification testimony, the central question is whether, under the totality of the circumstances, the identification was reliable. *Manson* [*v. Brathwaite*, 432 U.S. 98 (1977)]. This determination involves the application of a two-pronged test.

> "'"[T]he required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' . . . or 'impermissibly' . . . suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' . . . or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification ' . . . that allowing the witness to make an in-court identification would be a denial of due process." *United States ex rel. Phipps v. Follette*, 428 F. 2d 912, 914-15 (2d Cir.1970).'

"*Brazell v. State*, 369 So. 2d at 28-29 (emphasis added). *See also Donahoo v. State*, 371 So. 2d 68, 72 (Ala. Crim. App. 1979). In evaluating the likelihood of misidentification, the court must consider the following factors:

> "'[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness's degree of attention, [3] the accuracy of the witness's prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.'

> "*Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972) (emphasis added). *See also Ex parte Frazier*, [729 So. 2d 253 (Ala. 1998)]."

Ex parte Appleton, 828 So. 2d at 900.

In the present case, Slack had the opportunity to observe the perpetrator in the parking lot at the time of the offense. She was standing in the drive-through window that faces the parking lot in which the murder took place. There was testimony that the distance between the window and the victim's vehicle was 78 feet and 10 inches. (R. 810-11.) She testified that she heard two shots and then looked out the window and saw a man with a gun standing by the vehicle. She then saw him fire the gun as she heard the the third shot. (R. 164-65, 172-76.) She watched him run behind the McDonald's restaurant before she moved from the window. (R. 176-77.)

Slack became attentive to the offense and the perpetrator after the first two gunshots and clearly saw the man fire the third shot and run away. Although she did not specifically testify as to her degree of attentiveness, she was able to give a detailed description of the man, "which indicates a fair degree of attention on [Slack's] part." *Hull v. State*, 581 So. 2d 1202, 1206 (Ala. Crim. App. 1990).

Slack's description of Dotch was both detailed and accurate. She was able to describe his clothing and physical characteristics, including his skin color, haircut, height, and age. (R. 164, 707, 708.)

Slack's identification was tentative at the time of the photographic array; however, she did select and sign the photograph of Dotch as the man she thought she had seen. When shown the single photograph of

Dotch's profile, which reflected the perpetrator from the angle that she had been able to observe, she was able to positively identify him. (R. 920.)

The length of time between the offense and Slack's tentative identification at the photographic array was approximately two-and-a-half hours. She signed the back of Dotch's photograph at 5:00 p.m. (R. 166, 190); the offense occurred at approximately 2:30 p.m. Her positive identification was made 10 to 15 minutes later.

Based on the testimony given by Slack at the pretrial hearing on the motion to suppress the identification evidence in the present offense and on her testimony at trial, we conclude that her identification was sufficiently reliable.

B.

Dotch argues that the identification evidence from Tracy Sayer, who was in the drive-through lane at the McDonald's restaurant located next to the Subway sandwich shop at the time of the murder, was unreliable because, he says, the police engaged in improper conduct during the identification procedure. Specifically, he argues that the police made suggestive signals to her as she was looking at the array, that the photographic array was improper, and that the presence of several officers during the identification procedure was coercive.

Dotch alleges that the officers signaled Sayer or otherwise informed her of which photograph displayed the perpetrator. He specifically contends that by having Sayer sign next to the "checked 'tentative' box" of the first photographic array, the officers implicitly informed her that the suspect did appear in this array. (Dotch's brief 31.)

However, there is no indication from the testimony presented at the pretrial suppression hearing or at trial that the officers suggested to Sayer that she should pick a certain, or indeed any, photograph from the array. At the suppression hearing, Sayer testified that after looking at the first array, she could not positively identify the man she had seen and that she would feel better seeing pictures showing profiles. (R. 133.) She testified that the officer who administered the identification did not suggest that she should pick a certain photograph or tell her that the man who committed this offense appeared in the array. (R. 134-35.) She testified that he may have told her that the suspect may or may not have been present in the array. (R. 136.) She further stated that the officer did not assist her in any way in picking out the suspect. (R. 136.)

She testified that she did not recall signing the back of the array, but she identified her signature and stated that the array showed that it was a "negative i.d." (R. 137.) The record contains a copy of the reverse side of State's Exhibit 82, which is the first photo array. (S. 33.) This shows that Sayer's identification was marked as negative. The tentative box is not checked, and Slack's signature appears in the column designated for the witness's signature; this column is located to the right of the "remarks" column rather than next to the "tentative i.d." box. Thus, there was no impropriety by the police on this ground.

Dotch's argument that Sayer's identification was based on an improper photographic array refers to

the fact that she was shown a second array from which she made a positive identification.[5]

Dotch contends that because his photograph was the only one that was in the second photographic "array" and because Sayer knew that her first identification was incorrect, her positive identification from the second photograph was unreliable.

In *Wright v. State*, 641 So. 2d 299 (Ala. Crim. App. 1993), Wright alleged that the pretrial identification was tainted because his was the only photograph included in more than one lineup.[6] This Court held that the identifications were not unreliable and stated that the officer "did nothing to call attention to the appellant's photograph or to coerce the witnesses into choosing the appellant's photograph. The identification procedures were not unduly suggestive, although the appellant's picture was included in more than one photographic grouping." *Wright v. State*, 641 So. 2d at 300- 301.

Similarly, in *Ex parte Johnson*, 620 So. 2d 709 (Ala. 1993), on remand to, *Johnson v. State*, 620 So. 2d 714 (Ala. Crim. App. 1993), *cert. denied*, *Alabama v. Johnson*, 510 U.S. 905 (1993), Johnson alleged that because his photograph was included in two photographic arrays and he then appeared in a lineup before he was identified by the witness, "the process of identification was improperly repetitive." *Ex parte Johnson*, 620 So. 2d at 712. The Court stated:

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[5] To the extent that Dotch incorporates his argument that the men in the array varied as to physical attributes, this issue has already been discussed and held meritless. *See* Part I.A., *supra*.

[6] Wright contended that his photograph appeared in all three lineups, but the record showed that his photograph was included in only two of the three.

> "In this case, there is no indication that the police repeatedly arranged confrontations between Johnson and [the witness]; the mere fact that [the witness] was shown Johnson's picture and also saw him in the line-up does not establish any impropriety in the identification process. Under Alabama law, it is not error to have a defendant participate in both a photographic array and a line-up, even though he may be the only common participant in the two procedures. *Nicholes v. State*, 409 So. 2d 454 (Ala. Crim. App. 1981). . . . Moreover, the record indicates that the individuals in the photographic array and the line-up were physically similar to Johnson. The officer in charge of choosing the individuals for the line-up testified at trial that he took special care to locate participants who resembled Johnson, so that it would be as difficult as possible for [the witness] to distinguish Johnson. Because these pretrial identifying procedures did not make [the witness's] identification of Johnson inevitable, the Court of Criminal Appeals correctly held that the pretrial identification procedures were not impermissibly suggestive and that [the witness's] identification testimony was properly presented to the jury for its consideration. We are not, therefore, required to further examine the totality of the circumstances to determine whether there was a substantial likelihood of misidentification."

Ex parte Johnson, 620 So. 2d at 713.

Here also, as previously noted, the other participants in the photographic array resembled Dotch, so that his appearance in both arrays did not make Sayer's identification of him inevitable. In fact, Sayer

was shown both of the arrays by defense counsel at trial and asked whether any of the other participants were included in both of the arrays. She testified that "I'm not sure if there is only one particular person in both." (R. 705.)

Moreover, Dotch's allegation that, because Sayer knew that her first identification was incorrect, she knew that Dotch was the suspect because he reappeared in the second array, is without merit. Sayer did not make an incorrect identification; she was unable to make an identification in the first array.

Dotch also argues that the police conduct of "standing around" while Sayer viewed the photographs in the second array and of three officers' sitting at the table with her as she viewed the photographs in the first array was unduly suggestive. (Dotch's brief, at 32.) However, as previously determined, the mere presence of the officers does not indicate suggestiveness. *See* Part I.A., *supra*. There is no indication in the record that the officers were coercive or suggestive as to Sayer's identification. Sayer testified that the officers did not suggest to her which photograph, if any, she should pick out of the array. (R. 136, 137, 699, 700.)

Furthermore, Sayer's identification was reliable under the factors enumerated in *Neil v. Biggers*, *supra*. Sayer had a good opportunity to view the man as he "trotted" across the parking lot following the gunshots. (R. 129, 130.) She testified that it was "a clear day" and that the time was about 2:30 in the afternoon. (R. 131.) Although she did not testify as to the degree of attention that she paid to the man, her description was detailed. *See Hull v. State*, 581 So. 2d 1202, 1206 (Ala. Crim. App. 1990). Moreover, this

description given to the police was accurate and generally matched the other witnesses' descriptions. She described his clothing, his skin color, his height and build, and his haircut. (R. 130, 694.)

As to her level of certainty at the confrontation, she testified that she was unable to positively identify anyone from the first photographic array. She stated that she told the officer that she was "not a hundred percent sure the person [she] saw was there and that [she] had seen more of a profile and that [she] would feel more comfortable looking at a profile versus a full face, that [she] felt better identifying that person at a profile." (R. 700.) Approximately five hours later, at 9:00 or 10:00 p.m., she was shown the second array of men in profile and was positive of her identification of the profile photograph of Dotch as the man that she had seen running in the parking lot at the time of the offense. She also testified that she first spoke to the police about an hour following the offense at which time she was shown the first array. (R. 695.) She was shown the second array later the same night.

Thus, Sayer's testimony indicates that her identification was reliable based on her observations at the time of the offense. Moreover, there was no evidence of impropriety in the identification procedures used by the police.

C.

Dotch argues that the identification made by Brandi Moore, an employee at the McDonald's fast-food restaurant who was working at the first drive-through window, was unreliable because, he says, the police used improper procedures to obtain her identification. Specifically, Dotch contends that the

police coached her by informing her that the suspect appeared in the array[7] and had been involved in an on going dispute with the victim; by informing her that she had made the right decision by identifying the suspect in the array; and by pressuring her to make an identification.

Dotch alleges that the police coached Moore by telling her, before she viewed the array, that they had a suspect who had been involved in an on going dispute with the victim and that this suspect's photograph was included in the array. The transcript of the pretrial suppression hearing shows that Moore was confused as to the exact nature of the prosecutor's questions concerning whether she was told to pick out a particular photograph. She did not understand the import of certain semantics being used, and she became upset so that another witness had to be called to the stand in order to give Moore an opportunity to collect herself. The following transpired at the pretrial suppression hearing during Moore's direct examination

> "Q . . . And that detective, did that detective tell you which photo to pick?
>
> "A No, ma'am. He just told me to pick which one that I recognize.
>
> "Q Okay. And did he tell you, you had to pick one?
>
> "A I don't remember.
>
> "Q Well, in other words, did he say you must pick one of these photographs ?

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[7] Moore was shown the second photographic array depicting participants in profile.

"A He just told me to point one out.

"Q But did he say you had to pick one or did he say—

> [Defense counsel]: Your Honor, I object to arguing when the lady is giving her answer.
>
> "THE COURT: Well, the other problem is I can't hear the witness's answer. You're going to have to speak—Lean up a little bit and pull that toward your face. Pull that down toward—the microphone. And it doesn't work very well, so just really speak up. Go ahead and ask it again, please.

"Q Okay. What I'm trying to understand, Brandi, is when—we're just trying to get a better idea of what was the detective telling you about how you were—what instructions was he giving you about viewing a photo spread.

"A He just told me he was going to show some pictures and for me to pick—

> "THE COURT: I'm sorry, ma'am. It must be my ears and not your voice. Would you really make an effort to speak up, please, or maybe slow down a little bit? Go ahead and answer her question.

"Q Just speak loudly. It's okay. It's okay. You're doing fine. I know this is difficult. You're doing fine, okay? It's okay. He told you what? It's okay, sweetie. It's okay. You're doing fine.

> "THE COURT: Do you want to give her a moment to step down and become composed and maybe call another witness?"

(R. 160-61.)

When Moore returned to the stand, the prosecutor resumed questioning her concerning the police officers' instructions to her for identifying the man whom she had seen. She testified that no officer suggested to her that she should pick out a particular photograph; neither did an officer tell her that "the person who did this will be in" the array. (R. 179.)

Later, during Moore's cross-examination at the pretrial suppression hearing, the following transpired:

> "Q All right. And when they showed you that photospread, did they tell you why they were showing you that photospread?
>
> "A Um, I don't remember.
>
> "Q Well, did they tell you they thought they had somebody connected with this thing and they just wanted you to look in there and see if they were in there?
>
> "A Yes, sir.
>
> "Q All right. And did they tell you how they knew that the person they had in this photospread was whoever they thought was involved?
>
> "A Yes, sir.
>
> "Q How did they—what did they tell you?
>
> "A That they—it was an ongoing dispute between them.
>
> "Q Okay. So, they told you there was an ongoing dispute between the person that was shot; is that right?
>
> "A Yes, sir.
>
> "Q And somebody that was in that photospread?

"A Yes, sir.

"Q All right. And did they tell you that they had somebody that they thought was the one?

"A Yes, sir.

"Q And that that person was in the photospread?

"A Yes, sir.

"Q So, at that point, you knew that likely whoever it was, was in that photospread somewhere?

"A Yes, sir."

(R. 186-87.)

Moore testified on re-direct examination at trial that no officer suggested that she pick a particular photograph, but rather, "they just told [her] to point to the one that [she] thought that it was." (R. 726.) Her cross-examination and re-cross-examination did not address any possible suggestiveness by the police, and she again became upset shortly into the re-cross-examination and had to leave the stand.

Even if Moore was told prior to viewing the photographs that the suspect's picture was included in the array, this would not alone make the photographic array impermissibly or unnecessarily suggestive. In *Edwards v. State*, 574 So. 2d 864 (Ala. Crim. App. 1990), Edwards claimed that the photographic lineup was tainted because the witness believed the culprit was among the photographs that she was shown. This court stated:

"This alone would not make the photographic lineup suggestive. Even if the police officer suggested to [the witness] that the robber's

> picture was one of the seven pictures, this would not make the photographic lineup suggestive. This court has held in *Jones v. State*, 415 So. 2d 1233 (Ala.Cr.App. 1982), 'that a person [who] is actually told the suspect's photograph is among the pictures, although generally inadvisable, does not contaminate the identification proceeding.' *See Ramsey v. State*, 441 So. 2d 1065 (Ala.Cr.App. 1983)."

574 So. 2d at 867.

Moreover, even if an officer told her that the suspect's photograph was included in the array, there is no indication that an officer informed Moore of which photograph depicted the suspect. In a similar situation, this court stated:

> "Here the police officer merely told one of the identifying witnesses that based on the description she had previously given the police, he had a suspect in the group of photographs he handed her to view. He did not indicate in any manner which individual he suspected. We find that the police officer was merely stating the obvious. The very purpose of a photographic display is to assist in the apprehension of offenders. *Simmons* [*v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968)]. It would be a useless law enforcement procedure if a police officer showed a victim or a witness a spread of photographs where, based on a description previously furnished him, he suspected none of the individuals depicted."

Jackson v. State, 361 So. 2d 1152, 1154 (Ala. Crim. App. 1977.)

Moore clearly testified that she identified the man that she recognized from the photographic lineup and that the officers did not tell her which photograph she should select.

Dotch argues that the police signaled to Moore that she had made the correct identification when she signed the back of the photographic array next to the "tentative" box, indicating that she recognized photograph no. 2 as the perpetrator. He argues that because Sayer, another witness who had already made a positive identification of photograph no. 2, had signed the back of the array signifying that identification, Moore was notified that her identification was correct. (C. 35.)

However, Moore testified that she was shown the array and asked to pick the man she recognized as the man she saw in the parking lot. She affirmed that it was her signature on the back of the array, making a tentative identification of the man in photograph no. 2 because she believed he was the man she had seen. There is no testimony or evidence indicating that she read the other witness's identification on the back of the array or that viewing a positive identification after making a tentative one would have affected or did affect her decision in any way. Speculation from a silent record will not support a finding of prejudice. *Ex parte Walker*, 972 So. 2d 737, 755 (Ala. 2007), *cert. denied, Walker v. Alabama*, 552 U.S. 1077 (2007). A reviewing court can not presume error from a silent record. "'This court is bound by the record and not by allegations or arguments in brief reciting matters not disclosed by the record.' *Webb v. State*, 565 So. 2d 1259, 1260 (Ala.Cr.App. 1990). *See also Acres v. State*, 548 So. 2d 459 (Ala.Cr.App. 1987). Further, we cannot predicate error from a silent

record. *Owens v. State*, 597 So. 2d 734 (Ala.Cr.App. 1992); *Woodyard v. State*, 428 So. 2d 136 (Ala.Cr.App. 1982), *aff'd*, 428 So. 2d 138 (Ala.), *cert. denied*, 462 U.S. 1136, 103 S.Ct. 3120, 77 L.Ed.2d 1373 (1983)." *Whitley v. State*, 607 So. 2d 354, 361 (Ala. Crim. App. 1992).

Dotch also argues that because Moore was only 17 years old at the time of the offense, she was particularly susceptible to the police's suggestive techniques; he cites *Oakley v. State*, 457 So. 2d 459 (Ala. Crim. App. 1984), to support his argument. However, the witness's age was not held to be a factor in Oakley. Rather, in that case, this court wrote of the witness:

> "[The witness] testified at trial that she felt under pressure to 'pick' the person who assaulted her. On the way to the photographic lineup her mother had told her that it was her duty and responsibility to pick out a photograph from the array. [The witness] later described the procedure as 'like a test . . . I was afraid to choose because I was afraid of getting something wrong.'"

457 So. 2d at 460. The witness in *Oakley* also stated that she was told by police that the man she had originally picked out was not the man which caused her to change her identification to Oakley. There was no finding that the witness's age was a factor in determining the reliability of her identification.

Dotch also cites *Mason v. United States*, 414 F.2d 1176 (D.C. Cir. 1969), to support his argument; however, that case is also distinguishable from the present case. In *Mason* the witness was shown only a single mug shot. The court referenced her youth solely to state that she may have been under

pressure to make an identification because she was a young and inexperienced teller who was responsible for the loss of a large amount of money. She conceded that despite the unusually large amount of the withdrawal, she neglected to verify the signature; "thus, her prompt identification of the culprit leading to his apprehension could have promised to get her out of some very hot water." *Mason*, 414 F.2d at 1182. There was no mention that the witness's age made her more susceptible to any police techniques.

Although the witness's age may be a factor in determining credibility and weight of the evidence, it would not effect the admissibility of the witness's identification. *Cf. Alabama G.S.R. Co. v. Hall*, 105 Ala. 599, 17 So. 176, 179 (1895) ("The want of experience would go to the weight to be given to the evidence, but not to its admissibility.").

Moreover, to the extent that Dotch argues that the combination of suggestive techniques used by the police compounded the impact on the reliability of Moore's identification of Dotch as the perpetrator, none of the techniques were suggestive, and in combination they did not amount to impropriety. *See Jackson v. State*, 562 So. 2d 1373, 1384 (Ala. Crim. App. 1990) (holding that none of the questioned aspects of interrogation standing alone mandated a finding of coercion or inducement nor did their cumulative effect). *Compare Brazell v. State*, 369 So. 2d 25, 29 (Ala. Crim. App. 1978) (holding that "the totality of the circumstances, the combined and cumulative effect of these factors, the nature of the confrontation itself, the lack of necessity for a showup, the unusual hour, and the distinctive clothing create[d] an unduly suggestive identification procedure").

Moreover, Moore's identification was also reliable under the factors set forth in *Neil v. Biggers*, *supra*. Moore had the opportunity to view the man in the parking lot as he approached the driver's side of the vehicle and spoke to the person standing by the vehicle. (R. 157, 181, 182, 185, 722.) She watched him from the drive-through window, which faced the Subway sandwich shop. She saw the other person, who was seated in the vehicle, and then heard three gunshots. (R. 182, 722.) She saw the man run behind the McDonald's restaurant and watched the vehicle roll backward and hit a truck. (R. 157, 724.) She saw the legs of the person in the vehicle hanging out of the opened door. (R. 724.) She backed away from the drive-through window and informed her manager of what she had seen. (R. 183.) She testified at the pretrial hearing that she only saw him for "[m]aybe a minute." (R. 184.)[8]

Moore further testified that she was attuned to the events because the man walking across the parking lot caught her attention. She testified, "I was just—I knew something—I thought something was going to happen." (R. 181.) Moreover, "[s]he testified lucidly and in great detail as to the course of events that evening." *Hutchinson v. State*, 516 So. 2d 889, 893 (Ala. Crim. App. 1987).

The description she gave the police of the man was also accurate. She described his clothing, his age, his height, race, complexion, and haircut. (R. 157, 722.)

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[8] However, when testifying as to what she had seen at trial, she referred to a time gap of "a couple of minutes" between watching the two persons talk and hearing the gunshots. (R. 722.)

Her identification of Dotch's photograph as depicting the man whom she had seen was tentative. When the prosecutor asked her, "What does the word 'tentative' mean to you?", she responded, "Which one I think is right." (R. 727.) She testified that she was not certain that the photograph was of the man that she had seen in the parking lot. (R. 725.)

The photographic array was shown to Moore on the day following the offense. (R. 158, 723, 725.) The back of the array indicates that her identification was entered at approximately 9:40 a.m. (S.R. 35.) Therefore, less than 24 hours had passed from the time of the offense. *Hutchinson v. State*, 516 So. 2d at 893 (finding that the factor that "[t]he length of time between the crime and the photographic line-up was less than 24 hours" weighed in favor of an accurate identification).

D.

Each of the witnesses gave reliable identifications under the factors enumerated in *Neil v. Biggers*, supra. Furthermore, none of Dotch's allegations of suggestive techniques used by the police is supported by the record. Dotch, however, argues that, because of discrepancies in the descriptions of the man seen in the parking lot by the witnesses, their identifications should be discounted. He refers to Sayer's and Slack's descriptions of the man whom they had seen as being dark skinned, whereas Moore testified that the man had a medium complexion; that Moore guessed that the man's height was approximately 5'6" to 5'8" (R. 722), while Sayer testified that "if [she] had to guess, somewhere close to six feet" (R. 130)

and Slack described the man as being of "middle height." (R. 707, 708.)[9]

These descriptions do not vary to the extent that they call the reliability of the identifications into question. In *Thomas v. State*, 399 So. 2d 915 (Ala. Crim. App. 1981), the witnesses' descriptions varied from the description of Thomas provided on the lineup sheet, and this court found that the identifications were nonetheless reliable. This court wrote:

> "While the descriptions given by the witnesses vary somewhat with the description given on the lineup sheet, they are not so inconsistent that they preclude the possibility of appellant being the person described by the witnesses to the police. The only major discrepancy is [a witness's] estimation of the suspect's height as some three or four inches shorter than that of appellant."

Thomas v. State, 399 So. 2d at 920. *See Reese v. State*, 549 So. 2d 148, 154 (Ala. Crim. App. 1989), *overruled on other grounds, Huntley v. State*, 627 So. 2d 1013 (Ala. 1992) (Reese's claim that his conviction should be reversed because the victims' descriptions of the person who assaulted them differed presented a jury question). *Cf. Bell v. State*, 364 So. 2d 420, 423 (Ala. Crim. App. 1978) ("The fact that the State's witnesses described the item taken somewhat differently presented a question for the jury.").

> "'The weight of the evidence, the credibility of the witnesses, and inferences to be drawn from the evidence, where susceptible of more than one rational conclusion, are for the jury alone.

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[9] Dotch states in his brief on appeal that he is 6'4". (Dotch's brief, at 40.)

> *Willcutt v. State*, 284 Ala. 547, 226 So.2d 328 (1969).' *Walker v. State*, 416 So. 2d 1083, 1089 (Ala.Cr.App. 1982). 'It was within the province of the jury to give the evidence in the case whatever weight and emphasis they thought proper in reaching their verdict.' *Linson v. State*, 394 So. 2d 85, 92 (Ala.Cr.App. 1981). 'Where, as in this case, there is conflicting evidence presented by the prosecution and the defense, it is for the jury to resolve the conflict and determine the defendant's guilt or innocence. . . . In making its determination, the jury may believe or disbelieve all or any part of the testimony presented by either side.' *Terry v. State*, 424 So. 2d 652, 655 (Ala.Cr.App. 1982).
>
> "'Conflicting evidence always presents a question for the jury unless the evidence fails to establish a prima facie case. *Starling v. State*, 398 So. 2d 337 (Ala.Cr.App.), *cert. denied*, *Ex parte Starling*, 398 So. 2d 342 (Ala. 1981).' *Gardner v. State*, 440 So. 2d 1136, 1137 (Ala.Cr.App. 1983)."

Mosley v. State, 461 So. 2d 34, 36 (Ala. Crim. App. 1984).

Furthermore, Dotch contends that Slack and Sayer both gave unreliable identification testimony at trial because they both testified that they saw the man carrying a gun at the time of the offense, while neither had mentioned this fact to the police when she originally gave her statement. However, this matter was for the jury to resolve.

Similarly, in *Powell v. State*, 600 So. 2d 1085 (Ala. Crim. App. 1992), an officer described Powell as being 5'4" and weighing 135 pounds, whereas at trial he described Powell as being 5'5" or taller, as being

small and having a scar or burn on his neck "a fact not mentioned in his original report." The officer's identification, however, was held as not unreliable. *Powell v. State*, 600 So. 2d at 1086. Further, although the officer's description varied from Powell's actual appearance of over 5'8" and 162 pounds, the officer's identification was admissible. "Questions of identity are for the jury to resolve, *see Holton v. State*, 590 So. 2d 914 (Ala.Cr.App. 1990), *aff'd*, 590 So. 2d 918 (Ala. 1991) . . . ." *Id.*

Neither the cited discrepancies in the witnesses' descriptions nor the differences in the descriptions in their original statements and those in their testimony at trial discredited their identifications. The weight to be accorded to this evidence and the resolution of credibility decisions were matters for the finders of fact.

E.

Finally, Slack, Sayer, and Moore each positively identified Dotch in court as the man they had seen in the parking lot at the time of the offense. The initial identification procedure was not unnecessarily or impermissibly suggestive so as to be conducive to irreparable misidentification; thus, the witnesses did not require an independent basis for their identifications of Dotch. The in-court identifications were not a violation of Dotch's rights to due process. *Ex parte Wimes*, 14 So. 3d 131, 134 (Ala. 2009).

II.

Dotch contends that the introduction of prior-bad-act evidence irreparably tainted his trial, in violation of his rights to due process and a fair trial. Specifically, he argues that the introduction of this evidence rendered his trial unfair because, he says,

the indictment contained "irrelevant and inflammatory information that prejudiced the jury from the outset" and because the State was allowed to improperly introduce this evidence throughout all of the proceedings. (Dotch's brief, at 44-45.)

A.

Dotch contends that the indictment was overly prejudicial because it referred to his prior convictions. Moreover, he contends that the trial court compounded the error by reading the indictment to the jury.

Dotch failed to object on this ground to the trial court therefore, this issue is due to be analyzed under the plain-error rule. Rule 45A, Ala.R.Crim.P. According to this rule, "[i]n all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review . . . whenever such error has or probably has adversely affected the substantial right of the appellant."

> "'"Plain error is defined as error that has 'adversely affected the substantial right of the appellant.'" *Ex parte Brown*, 11 So. 3d 933, 936 (Ala. 2008), quoting *Hall v. State*, 820 So. 2d 113, 121 (Ala. Crim. App. 1999).
>
> > "'"The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it

> 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' *See Ex parte Price*, 725 So. 2d 1063 (Ala. 1998), *cert. denied*, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State*, 723 So. 2d 742 (Ala. Crim. App. 1997), *aff'd*, 723 So. 2d 770 (Ala. 1998), *cert. denied*, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State*, 620 So. 2d 679, 701 (Ala. Crim. App. 1992), *rev'd on other grounds*, 620 So. 2d 709 (Ala. 1993), *on remand*, 620 So. 2d 714 (Ala. Crim. App.), *cert. denied*, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."
>
> "'*Hall v. State*, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999), *aff'd*, 820 So. 2d 152 (Ala. 2001). Although the failure to object will not preclude our review, it will weigh against any claim of prejudice. *See Dill v. State*, 600 So. 2d 343 (Ala. Crim. App. 1991), *aff'd*, 600 So. 2d 372 (Ala. 1992).'"

Johnson v. State, [Ms. CR-99-1349, Oct. 2, 2009] __ So. 3d __, __(Ala. Crim. App. 2005) (opinion on remand from the Alabama Supreme Court), quoting *Sale v. State*, 8 So. 3d 330, 345 (Ala. Crim. App. 2008), *cert. denied*, *Ex parte Sale*, 8 So. 3d 352 (Ala. 2008), *cert. denied*, *Sale v. Alabama*, __ U.S. __, 129 S.Ct. 2062 (2009).

Count two of the indictment charged Dotch with violating § 13A-5-40(a) (14), Ala. Code 1975, which designates as capital.

> "murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury

> proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness."

In the present case, count two of the indictment specifically charged that Dotch

> "did intentionally cause the death of another person, to-wit: Timarla Taldon, by shooting her with a gun, when the said Timarla Taldon was or had been subpoenaed to testify, or had testified in a criminal trial or criminal proceeding in the case of *State of Alabama vs. Garrett Dotch*, in the Grand Jury of Mobile County that indicted said defendant for Burglary 1st degree and Assault 3rd degree and/or the case of M-05-05-2768 where the defendant was charged and found guilty of Domestic Violence 3rd degree of Timarla Taldon and the said murder stemmed from, was caused by, or was related to the capacity of the said Timarla Taldon as a witness, in violation of 13A-5-40(a) (14) of the Code of Alabama against the peace and dignity of the state of Alabama."

Thus, the references to the prior convictions provided the factual basis for the charge as to the criminal proceeding for which the victim, Taldon, was a witness. These facts placed Dotch on notice as to the exact charge so that he could prepare a knowing and adequate defense.[10] "The crucial question, of

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[10] Rule 13.2(e), Ala.R.Crim.P., provides for a motion for more definite statement when an indictment fails to include sufficient details or facts to support the charge to apprise a defendant of

course, is whether the indictment sufficiently apprises the accused with reasonable certainty of the nature of the accusation made against him so that he may prepare his defense, that he may be protected against a subsequent prosecution for the same offense." *Ex parte Harper*, 594 So. 2d 1181, 1183 (Ala. Crim. App. 1991), *cert. denied*, *Harper v. Alabama*, 506 U.S. 918 (1992.)

The State was required to prove that Taldon was a witness in a criminal proceeding and that that role spawned her murder. Therefore, the State was required to prove that there was such a criminal proceeding. Thus, this language in the indictment specified the facts that would be proved to fulfill this element of the charged offense. *Johnson v. State*, [Ms. 1041313, Oct. 6, 2006)] __ So. 3d __, ___ (Ala. 2006), on remand to, *Johnson v. State*, [Ms. CR-99-1349, October 2, 2009] __ So. 3d __ (Ala. Crim. App. 2005) (holding that it was "'highly necessary'" for the State to prove the bigamy conviction against Johnson because the conviction was an essential element of the charge of capital murder of a witness who had testified against her and was thus substantive evidence; further, the other allegations of adultery and bad acts were properly admitted as part of the res gestae of the offense and were therefore substantive evidence).

Because the indictment properly mentioned the prior convictions, the trial court's instructions to the jury, in which the judge read the indictment and charged as to the requisite proof of the elements of the charged offenses, were also proper.

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the exact charge he or she must defend against. Dotch made no such motion.

B.

Dotch also argues that the prior convictions were inadmissible because, he says, they were irrelevant to the charge under count two of the indictment alleging murder made capital because the victim was a person who has testified in a criminal proceeding and the murder stemmed from, was caused by, or was related to the victim's role as a witness. He also submits that the prior convictions were not admissible to show motive or intent.

However, as stated in Part II.A., the prior convictions were admissible because the State had to prove that there was a criminal proceeding involving the victim as a witness that had precipitated the murder. Because the prior offenses were properly charged in the indictment as the factual basis of an element of the offense, it was incumbent upon the State to prove them. Further, the convictions were relevant because they were also introduced to prove motive and intent. *Johnson v. State*, [Ms. 1041313, October 6, 2006] __ So. 3d at __.

The evidence of Dotch's prior convictions was relevant to the charge in count two of the present case. As stated in *Brown v. State*, [Ms. CR-07-1958, November 13, 2009] ___ So. 3d ___ (Ala. Crim. App. 2009), concerning the relevancy of evidence:

> "'Rule 402, Ala. R. Evid., provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State." Rule 401, Ala. R. Evid., defines "relevant evidence" as "evidence having any tendency to make the existence of

> any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Alabama recognizes a liberal test of relevancy, which states that evidence is admissible 'if it has any tendency to lead in logic to make the existence of the fact for which it is offered more or less probable than it would be without the evidence.'" *Hayes* [*v. State*], 717 So. 2d [30] at 36 [(Ala. Crim. App. 1997)], quoting C. Gamble, *Gamble's Alabama Evidence* § 401(b). "[A] fact is admissible against a relevancy challenge if it has any probative value, however[ ] slight, upon a matter in the case." *Knotts v. State*, 686 So. 2d 431, 468 (Ala. Crim. App. 1995), *aff'd*, 686 So. 2d 486 (Ala. 1996). Relevant evidence should be excluded only "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, Ala. R. Evid. "The general rule is that articles which are properly identified and which tend to show the commission of the crime or the manner in which it was committed or elucidate some matter in issue are admissible in evidence for inspection and observation by the jury." *Beasley v. State*, 408 So. 2d 173, 179 (Ala. Crim. App. 1981)."

Brown v. State, __ So. 3d at __, quoting *Gavin v. State*, 891 So. 2d 907, 963-64 (Ala. Crim. App. 2003).

These convictions were necessary to prove the second count of the indictment and were relevant to Dotch's motive and intent. *Johnson v. State*, [Ms. CR-99-1349, October 2, 2009] __ So. 3d at __.

In *Stephens v. State*, 982 So. 2d 1110 (Ala. Crim. App. 2005), *reversed on other grounds*, 982 So. 2d 1148 (Ala. 2006), this Court addressed the admission of prior convictions in cases involving domestic abuse or a history of violence for proving motive and intent in a current murder case:

> "It has long been the rule in Alabama that former acts of cruelty, hostility, or violence by the accused toward the victim are admissible in order to establish a motive to commit the charged homicide. *See, e.g., Bennefield v. State*, 281 Ala. 283, 202 So.2d 55 (1967) (evidence of husband's prior assaults on wife admissible to establish motive in prosecution for murder because acts 'tended to show ill feeling between the parties'); *Patterson v. State*, 243 Ala. 21, 8 So.2d 268 (1942) (proof that husband had previously been convicted of assaulting his wife admissible to establish motive in prosecution for murder); *Doane v. State*, 351 So.2d 648, 653 (Ala. Crim. App. 1977) (testimony concerning premarital fight between defendant and victim admissible to establish motive and malice in prosecution for manslaughter). Indeed, Professor Gamble has noted:
>
> > "'One of the most common cases where motive is shown is that where the wife allegedly is murdered by the husband. In these cases a whole host of circumstances, existing between the two parties, are admitted for the purpose of showing that one spouse had a motive for killing the other.
> >
> > "'Former acts of hostility or cruelty by the accused upon the victim are very commonly the basis for the prosecution's proof that the

accused had a motive to commit the charged homicide.'

"1 C. Gamble, *McElroy's Alabama Evidence* § 45.01(8).

"Here, evidence was admitted concerning a history of marital difficulties between Stephens and Annie. As a result, Annie and the couple's three children had moved out of the marital residence several months earlier and were living with Annie's father at the time the homicides occurred. Although Annie returned to the couple's mobile home to do laundry, she did so when Stephens was not present, most likely to avoid a confrontation. Annie's father testified that in 1992 Stephens had shot Annie following an argument, resulting in his conviction for second-degree assault. During closing argument, the State argued that the evidence demonstrated that Stephens's motive for killing Annie was in all likelihood rage. Thus, evidence of the 1992 shooting was admitted to support the State's theory that Stephens had stabbed his wife in a fit of rage, following an argument or some other type of confrontation.

"Evidence of the 1992 conviction was likewise admissible under the intent exception to the general exclusionary rule.

"Addressing the admissibility of collateral-act evidence pursuant to the intent exception, Professor Gamble has written:

> "'If the accused is charged with a crime that requires a prerequisite intent, collateral crimes, acts or misconduct are admissible to show that the accused possessed the

> necessary intent. This rule is based upon the theory that because the unintentional doing of an act is abnormal and unusual, the more a person does other acts similar to the act in question, the greater the likelihood that the act in question was not done inadvertently. Whether the collateral act has a tendency to show that the accused did possess the prerequisite state of mind is, of course, one of relevancy vested largely in the discretion of the trial court.'
>
> "1 C. Gamble, *McElroy's Alabama Evidence* § 69.01(5) (footnotes omitted)."

Stephens v. State, 982 So. 2d at 1128-29.

Moreover, the relevance of the evidence of these convictions was not outweighed by the evidence of its prejudicial impact. "The State did not use this evidence to confuse the jury, or '"to imply the inference of facts which do not exist,"' or '"to bolster a weak case against the defendant."' *Blackmon v. State*, 7 So. 3d 397, 430 (Ala. Crim. App. 2005)." *Johnson v. State*, [Ms. CR-99-1349, October 2, 2009] __ So. 3d at __.

The trial court did not abuse it's discretion in determining that this evidence was admissible. *Ex parte Loggins*, 771 So. 2d 1093, 1103 (Ala. 2000).

C.

Dotch argues that because the jury acquitted him as to count two of the indictment, which charged that the murder stemmed from or was related to Taldon's role as a witness in a criminal proceeding, evidence of the prior convictions should not have been admitted. He submits that because the convictions pertained

only to this charge and were irrelevant to the capital charge of murdering Taldon by using a deadly weapon while Taldon was in the vehicle, the admission of the evidence of the prior convictions was reversible error.

However, relevance relates to the crime or crimes charged and is evaluated at the time the evidence is sought to be introduced. Here, Dotch was charged with two capital offenses. Although the jury found that the State had failed to prove count two of the indictment, Dotch was validly charged with that crime. Dotch did not move for a severance and does not now argue that the charges should have been severed.[11] He contends that because the State did not present sufficient evidence of count two of the indictment, the admission of evidence of the prior convictions was reversible error.

Furthermore, Dotch did not suffer compelling prejudice by the admission of these collateral acts because they were admissible as motive leading up to the murder, as well as intent. "'When evidence of a former difficulty between a defendant and the assaulted party is offered by the State, it is for the purpose of shedding light on the true conduct of the defendant at the time of the subsequent difficulty for which the accused is on trial.'" *Barton v. State*, 494

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[11] The charges here were properly consolidated because the crimes were ""of a same or similar character so that a person evaluating the crimes would believe that the offenses were committed by the same person."" *Culver v. State*, 22 So. 3d 499, (Ala. Crim. App. 2008), *cert denied*, *Culver v. State*, 22 So. 3d 530 (Ala. 2009), *cert. denied*, *Culver v. Alabama*, U.S. __, 130 S.Ct. 462, 175 L.Ed. 2d 308 (2009) Moreover, evidence concerning each of these offenses would have been admissible in the trial for the other offense. *Id*.

So. 2d 943, 952 (Ala. Crim. App. 1986) (holding that the victim's testimony concerning former beatings was not offered for the purpose of showing Barton's bad character but was admissible as evidence of motive and intent), quoting *Thigpen v. State*, 50 Ala. App. 176, 277 So. 2d 922, 924 (1973). *See also Johnson v. State*, [Ms. 1041313, October 6, 2006] __ So. 3d __.

The evidence indicates that Dotch had been terrorizing Taldon for years, culminating in her murder. After their break-up, Taldon attempted to move forward in her life without Dotch. He, however, continued to victimize her until he shot her in the parking lot as she attempted to leave her workplace.

Despite Dotch's acquittal as to count two, the evidence of the prior convictions was admissible.

III.

Dotch argues that the trial court committed plain error by failing to sua sponte give limiting instructions to the jury concerning its use of the prior-conviction evidence. However, in a similar case, the Alabama Supreme Court has held that such limiting instructions are not necessary because, as in the present case, the prior convictions were being introduced as substantive evidence. *Johnson v. State*, [Ms. 1041313, October 6, 2006] __ So. 3d at __.

Although Dotch cites *Ex parte Minor*, 780 So. 2d 796 (Ala. 2000), and *Snyder v. State*, 893 So. 2d 482 (Ala. 2001), in support of his claim, the Alabama Supreme Court in *Johnson v. State*, __ So. 3d at __, distinguished these cases from the present situation, because in those cases, the prior-conviction evidence was being introduced to impeach the defendants' credibility. In those cases, the prior convictions were

not substantive evidence of the offenses. The Court wrote:

> "It is contradictory and inconsistent to allow, on the one hand, evidence of Johnson's prior bigamy conviction and prior bad acts as substantive evidence of the offense with which she was charged, yet, on the other hand, to require a limiting instruction instructing the jury that it cannot consider the evidence as substantive evidence that Johnson committed the charged offense."

Johnson v. State, __ So. 3d at __.

Thus, the trial court acted properly in not giving limiting instructions to the jury concerning Dotch's prior convictions.

IV.

Dotch argues that the trial court improperly prohibited the introduction of evidence of Dotch's civil commitment, in violation of his rights to due process, a fair trial, and a reliable sentencing. He contends that because he entered a plea of not guilty by reason of mental disease or defect, the trial court abused its discretion by excluding evidence concerning the probate court's 2003 order of committing Dotch to a mental-health facility. Dotch alleges that this evidence was relevant to his plea and necessary to rebut the State's prior-conviction evidence.

Dotch specifically argues in his original brief on appeal, firstly, that the trial court erred by referring to an incorrect and outdated legal analysis used by probate courts to determine whether individuals should be committed. He submits that this amounted to an abuse of discretion. He further contends that

the two cases cited by the State in its brief on appeal are based on the old legal basis for determining commitment and are therefore inapposite.

According to § 22-52-10.4(a), Ala. Code 1975, which governs the necessary findings by the court to commit a person to inpatient treatment:

> "A respondent may be committed to inpatient treatment if the probate court finds, based upon clear and convincing evidence that: (i) the respondent is mentally ill; (ii) as a result of the mental illness the respondent poses a real and present threat of substantial harm to self and/or others; (iii) the respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently; and (iv) the respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable."

The forerunner to this provision, § 22-52-10(a), Ala. Code 1975, which addressed the findings necessary for involuntary commitment and which was repealed by Act No. 91-440, Ala. Acts 1991, p. 783, § 14, stated:

> "(a) If at the final hearing upon a petition seeking to commit a person to the custody of the state department of mental health or such other public facility as the court may order, the probate judge, on the basis of clear, unequivocal and convincing evidence, shall find:
>
> "(1) That the person sought to be committed is mentally ill; and

> "(2) That as a consequence of the mental illness the person poses a real and present threat of substantial harm to himself or others; and
>
> "(3) That the threat of substantial harm has been evidenced by a recent overt act; and
>
> "(4) That treatment is available for the person's mental illness or that confinement is necessary to prevent the person from causing substantial harm to himself or to others; and
>
> "(5) That commitment is the least restrictive alternative necessary and available for treatment of the person's mental illness. . . ."

The determination to be made by a jury in a criminal trial when a defendant enters a plea of not guilty by reason of mental disease or defect is governed by § 13A-3-1, Ala. Code 1975, which states:

> "(a) It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> "(b) 'Severe mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> "(c) The defendant has the burden of proving the defense of insanity by clear and convincing evidence."[12]

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[12] *See West v. State*, 586 So. 2d 999, 1000 (Ala. Crim. App. 1991) ("'Insanity is an affirmative defense, and a defendant who

See Ivery v. State, 686 So. 2d 495, 500-02 (Ala. Crim. App. 1996), opinion after remand, 686 So. 2d 520 (Ala. Crim. App. 1996) (analyzing the meaning of and proof necessary to establish "wrongfulness" as that term is applied to criminal insanity). The commentary to § 13A-3-1 explains:

> "The law in Alabama on insanity as a defense in a criminal case has been well recognized:
>
> > "'Under a plea of not guilty by reason of insanity, the burden is on the defendant to clearly prove to the reasonable satisfaction of the jury that he was so affected by disease of the brain when the offense was committed as to render him so insane that he did not know right from wrong with respect to the particular offense charged, or by reason of such mental disease he could not resist doing the wrong; and the crime must have been the product solely of such diseased mind.' *Streeter v. State*, 278 Ala. 272, 177 So. 2d 826 (1965); *Aaron v. State*, 271 Ala. 70, 122 So. 2d 360 (1960); *Lee v. State*, 265 Ala. 623, 93 So. 2d 757 (1957); *Lakey v. State*, 258 Ala. 116, 61 So. 2d 117 (1952) and cases cited; *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1886)."

Section 15-16-2, Ala. Code 1975, requires that "[t]he defense of insanity in all criminal prosecutions shall

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raises it must prove "by a preponderance of the evidence and to the reasonable satisfaction of the jury," *Maqwood* [*v. State*], 426 So. 2d [918], 921-22 (Ala. Crim. App. 1982), that he was insane at the time of the offense. *Maqwood*, 426 So. 2d at 922. *See also McKinnon v. State*, 405 So. 2d 78, 80 (Ala.Cr.App. 1981).' *Demos v. State*, 555 So. 2d 1169, 1173 (Ala.Cr.App. 1989).").

be clearly proved to the reasonable satisfaction of the jury."

The determination and analysis when deciding whether a person is so insane that he can be committed on a Judge's order, differ from that of the determination and analysis when deciding whether a person has met his burden of proving that he is not guilty of a crime by reason of mental disease or defect. Because the questions to be asked in determining if someone should be committed are different from the questions to be asked in determining mental disease or defect as an affirmative criminal defense, the probate judge's order was based on a different standard in evaluating Dotch's mental state. Such a distinction may cause jury confusion and misunderstanding. The trial court in the present case therefore stated:

> "The Court: . . . . I think the standard the Probate Court looks at is because of some mental condition, the person before the court poses a real and present danger to themselves or others and are in need of medical attention. They may call that insane. They may call it something else. Of course, what we deal with here is whether the Defendant—or the jury believes, because of a severe mental illness or defect, the Defendant was unable to appreciate the nature and quality of his acts or was unable to appreciate the wrongfulness of his acts. I'm just not sure that the adjudication in Probate Court is focused on the same legal standard as we are here. What I was thinking to say is that I think it would be improper to infer or argue to the jury that this man's insanity or mental—severe mental disease or defect has been determined by

> another court for several reasons. One is, again, I'm not sure the same legal standard is being applied. And secondly, I think the testimony here has to be that he suffered that condition at or about the time of the commission of this offense. And he was, obviously, released from Searcy Hospital, so somebody found he had overcome whatever defects he was suffering from. §, I don't know that it's relevant."

(R. 911-12.)

The trial court later stated:

> "[I]t would be, I think, improper to have this jury infer that the issue of his 'sanity' has already been decided by a court of competent jurisdiction because no matter what was decided in Probate Court, at that point in time, first of all, you, this morning, probably educated me as to the new procedures and due process requirements of Probate Court and the adversarial nature of all of that.
>
> "But getting beyond that, I don't—I don't think the Probate Court reads the pattern jury instruction on mental disease or defect, which is an excuse for criminal conduct, and applies that standard, which is the standard this jury has got to apply, before [it] involuntarily commit[s] somebody."

(R. 1016.)

Thus, the trial court found that, not only did the inquiries and determinations by the probate court findings and the jury differ, but the time period pertinent to the evaluation also differed. The commitment proceedings addressed Dotch's mental state

before the hearing; after treatment he was found to be sane enough for release. Here, the pertinent period surrounds the commission of the offense, which was long after his release.

Whether the trial court gleaned the probate court's determination to have been made pursuant to § 22-52-10, Ala. Code 1975, which was repealed, or the current law, § 22-52-10.4(a), Ala. Code 1975, the judge correctly stated that neither statutory analysis mirrors the present inquiry and therefore could confuse the jury. This is more so because a judge's order, which might carry a presumption of correctness to a jury, was involved. *Cf. generally, Lanzi v. Alabama Dept of Revenue*, 968 So. 2d 18, 21 (Ala. Civ. App. 2006) (holding that because a reviewing circuit court applies different standards from an appellate court when reviewing an administrative law judge's order, no presumption of correctness applies).

Because neither of the statutes concerning commitment was relevant to the present case, the trial court did not err by alluding to the repealed analysis. Rule 45, Ala.R.App.P. ("No judgment may be reversed or set aside, nor new trial granted on the ground of misdirection of the jury . . . unless in the opinion of the court to which the appeal is taken . . . after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). *See generally, Lewis v. State*, 889 So. 2d 623, 693-94 (Ala. Crim. App. 2003) (despite Lewis's contention that the trial court erroneously applied the standard of legal insanity in determining whether his history of mental illness constituted mitigating evidence, the judge's finding that Lewis was aware of the wrongfulness of his actions was merely a statement in his

determination that the evidence of mental illness was unpersuasive and was not applied in his consideration of mitigating evidence).

Dotch further argues that the trial court abused its discretion by excluding the probate court's order of commitment because "[e]vidence of the probate court materials were relevant to [his] mental health history." (Dotch's brief, at 75.)

However, the trial court agreed that evidence of Dotch's commitment (other than the probate court's order) and the medical evaluations and treatments relative to the commitment were relevant and admissible. The record indicates that these materials were allowed into evidence at trial. When granting the state's motion in limine to prevent the defense from introducing any evidence of the probate court's proceedings, the trial judge stated:

> "THE COURT: Now, let me say this: I'm not—By making this ruling on the State's motion in limine, I'm not saying that his prior mental condition could not be considered by and, perhaps, testified about by a medical—a mental health expert who may come to testify. He may say I've looked at his history of illnesses, I've looked at his condition and, you know, in support of a diagnosis that at the relevant time and place, he suffered from this condition. So, I don't think I can exclude the fact that he was hospitalized, but I'm more concerned about trying to infer that the issue has already been decided—
>
> "[Defense counsel]: Your Honor—
>
> "THE COURT:—if that made any sense."

(R. 913.)

The court thereafter stated:

> "Now, turning our attention to your motion in limine, I agree with the State's position that the Defendant will be instructed and the Defendant is instructed in his questioning of witnesses and in his closing arguments or any other comments that the Defendant is not to make any reference to the court proceedings in the Probate Court as it related to the commitment of the Defendant to a state mental hospital. That's a court proceeding that I don't think is relevant to the issues to be decided by this jury.
>
> "I am not, however, stating that the fact that he was at one time committed to or a patient in a state hospital would not, perhaps—I don't know what the testimony is going to be. It may be relevant as to his background, particularly if Dr. Van Rosen or whomever else testifies that he looked at all of these documents and he saw documents from Searcy Hospital and that has some bearing on his ultimate opinions that he offers in this case.
>
> "So, I'm not saying you can't talk about Searcy or that he was there or when he was there but as far as that a probate judge made a judicial determination is what I'm restricting you from talking about."

(R. 1014-15.)

Thus, Dotch was allowed to introduce evidence that he had been committed to Searcy Mental Facility (R. 1018) and that he had received treatment there. He was also allowed to introduce medical records pertaining to his commitment. Although the probate judge's order was relevant by definition to the issue

whether Dotch suffered from a mental disease or defect, the exclusion of relevant evidence does not always result in reversible error. The order was cumulative of other evidence of Dotch's commitment and medical diagnoses, treatments, and reports.

The discretion to determine the relevancy of evidence is properly vested in the trial court and "an appellate court ought . . . to [only] correct a plainly prejudicial misuse of discretion by the trial court." C. Gamble, *McElroy's Alabama Evidence* §21.01(6) (4th ed. 1991).

> "Rule 403, Ala. R. Evid., provides:
>
> > "'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'
>
> "*See also Houston v. State*, 565 So. 2d 277, 281 (Ala. Crim. App. 1990) (holding that n[t]he exclusion of admissible evidence does not constitute reversible error where the evidence "would have been merely cumulative of other evidence of the same nature, which was admitted."). In this case, much of the information that was included in the excluded documentation was not relevant and could have resulted in a confusion of the issues for the jury. Also, the information that was relevant was merely cumulative to testimony...that had not been disputed by the State."

Newton v. State, [Ms. CR-05-1517, October 2, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009).

As this Court stated in *Beckworth v. State*, 946 So. 2d 490 (Ala. Crim. App. 2005), *cert. denied*, *Beckworth v. Alabama*, 549 U.S. 1120(2007):

> "'Furthermore, even if the trial court's ruling was erroneous, we do not believe the error injuriously affected the substantial rights of this appellant. Matters in the excluded records pertaining to the appellant's home and family were admitted in evidence through other records and through the testimony of numerous witnesses, thus making the evidence in the excluded records cumulative. The appellant's sister testified at the sentencing hearing about the home and family life of the appellant. Thus, if error occurred, at all, it was harmless. *See* Ala.R.App.P. 45; *McMahon v. State*, 560 So. 2d 1094 (Ala.Cr. App. 1989).'
>
> "*Id. See also Ex parte Hodges*, 856 So. 2d 936, 945-48 (Ala. 2003) (testimony about defendant's unstable home environment was relevant, but no reversible error occurred when prosecutor's objections to testimony were sustained because the defendant was able to present most of the evidence through later testimony); *Windsor v. State*, 683 So. 2d 1027, 1038-39 (Ala. Crim. App. 1994), *aff'd*, 683 So. 2d 1042 (Ala. 1996) (trial court erred in excluding hearsay evidence, but no reversal due because similar evidence was presented in later testimony)."

946 So. 2d at 505-06.

Although the probate court's order was relevant to Dotch's plea of not guilty by reason of mental disease or defect, the admission into evidence of the order

may have caused confusion of the issues, may have been misleading to the jury, and was cumulative of other evidence concerning Dotch's commitment and mental-health history. Because its probative value did not outweigh its potential prejudicial effects, the trial court did not abuse its discretion so as to plainly prejudice Dotch.

Finally, Dotch argues that the State opened the door to the admission of the probate court's order of commitment by introducing evidence of the prior convictions that precipitated the order. Dotch contends that the State introduced these convictions to prove Dotch's sanity at the time that the offenses underlying those convictions were committed, thereby rebutting Dotch's insanity defense.

As previously held, the State properly introduced evidence of the prior convictions to satisfy its burden of proving § 13A-5-40(14), Ala. Code 1975, and as motive of and intent in the victim's murder. *See* Part II.B. and C. The prior convictions were introduced as substantive evidence of the stated charged offense. They were also introduced to show motive as a result of the break down of Dotch and the victim's relationship. They further showed intent by indicating that the murder was not inadvertent. Any light shed as to Dotch's mental state at the time of the commission of these offenses was incidental. "[E]vidence of separate crimes is admissible if it tends to prove guilt of the crime for which the defendant is being tried and such '"evidence is relevant and competent [and] it should be admitted regardless of its incidental effect."' *Weeks v. State*, 456 So. 2d 395, 399-400 (Ala.Cr.App. 1983), *affirmed*, 456 So. 2d 404 (Ala. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985); C. Gamble, *McElroy's Alabama Evidence*,

§ 69.01(1) (3rd ed. 1977)." *Haywood v. State*, 501 So. 2d 515, 519 (Ala. Crim. App. 1986).

> "'All evidence is relevant which throws, or tends to throw, any light upon the guilt or innocence of the prisoner. And relevant evidence which is introduced to prove any material fact ought not to be rejected merely because it proves, or tends to prove that at some other time or at the same time the accused has been guilty of some other separate, independent and dissimilar crime. The general rule is well settled that all evidence must be relevant. If the evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime or may establish some collateral and unrelated fact.'"

Weeks v. State, 456 So. 2d 395, 400 (Ala. Crim. App. 1983), *affirmed*, 456 So. 2d 404 (Ala. 1984), *cert. denied*, 471 U.S. 1030 (1985).

Although the prosecutor stated in a pretrial hearing that the prior convictions were admissible to rebut the mental disease-or-defect defense, her arguments to the jury concerning the admission of evidence of the convictions were directed at the purposes of proving § 13A-5-40(14), Ala. Code 1975, and proving Dotch's motive and intent for the murder. Thus, although the evidence of the prior convictions may have also shed light on Dotch's mental state at that time, that was an ancillary effect. Therefore, the State did not open the door to the admission of the order to rebut the possibility of this incidental effect. *Compare Ex parte Drinkard*, 777 So. 2d 295, 302 (Ala. 2000) (where the State introduced part of a

statement, Drinkard was allowed to introduce the rest of the statement and, although it referenced a collateral crime, the State could not introduce evidence of the collateral offense under the posture that Drinkard opened the door to its admission). *Compare also Ex parte Brownfield*, [Ms. 1070255, December 23, 2009] __ So. 3d __ (Ala. 2009) (Brownfield did not open the door for the State to introduce statements he made during a mental evaluation that would otherwise be inadmissible simply because Brownfield had introduced evidence of his mental state at the time of the offense and had entered a plea of not guilty by reason of mental disease).

A party does not ordinarily open the door to the introduction of rebuttal evidence to disprove a matter that was not the apparent and argued intent for the introduction of the original evidence. Here, the intent of the State's introduction of this evidence was to satisfy its burden of proof of the capital offense, § 13A-5-40(a) (14), Ala. Code 1975, and to prove intent and motive; therefore, Dotch was properly not allowed to introduce the probate court's order of commitment to prove his mental illness at the time of the prior offenses.

Furthermore, as previously stated, because Dotch was allowed to introduce evidence that he was committed to Searcy Mental facility following the offenses, and his evaluations and treatment were also admitted, any error in failing to allow the probate court's order into evidence did not injuriously effect his substantial rights. Rule 45, Ala.R.App.P.

V.

Dotch argues that the verdict forms given the jury and the related instructions were erroneous and

invited juror confusion. Specifically, Dotch argues that the trial court improperly provided the jury with a separate form for a verdict of not guilty by reason of mental disease or defect and caused the jury to disregard this verdict by giving them incorrect instructions.

Dotch failed to object to the verdict forms or the trial court's original charge to the jury concerning its use of the verdict forms. However, defense counsel objected following the trial court's instructions given to the jury in response to its question during deliberations as to the verdict forms.

The record indicates that the trial court determined that the verdict of not guilty by reason of mental disease or defect should be presented to the jury on a separate form in order to avoid a split verdict. The following transpired at trial:

> "THE COURT: And then the verdict—How would you think, that it would be on Count One, guilty, not guilty or not guilty by reason of mental disease or defect? And on the second verdict form, guilty, not guilty or not guilty by reason of mental disease or defect, et cetera?
>
> "[Defense counsel]: I think that follows up the charge we had—
>
> "THE COURT: It seems to me at the time in question, if he's not guilty by reason of mental disease or defect, he's not guilty as to any of them. So, I don't know if you could have just one form that we find the defendant—
>
> "[Prosecutor]: Yeah, I would think you would have to have one form not guilty by reason of mental disease or defect because what if they—

"THE COURT: Split—

"[Prosecutor]: Yeah, you don't want inconsistent verdicts.

"THE COURT: Maybe you're right. I'll explain that to the jury.

"[Defense counsel]: That's fine."

(R. 1325-26.)[13]

Dotch argues that the verdict form deviated from the Alabama Pattern Jury Instructions and that it confused the jury. He argues that the trial court also deviated from the pattern jury instructions in its charge to the jury concerning its use of the verdict forms. The record indicates that the trial court first charged the jury as to its process in arriving at a proper verdict. The court instructed that the jury should first consider the charges in the indictment, then if the jury found Dotch not guilty as to these offenses, it was to consider the lesser-included offense of murder. If it found Dotch not guilty of murder, then the trial court charged that the jury should consider reckless manslaughter. The trial court next charged the jury concerning Dotch's special plea of not guilty by reason of mental disease or defect. The trial court further charged that if the jury found Dotch guilty of the offense or offenses charged in the indictment or a lesser-included offense, then it should consider Dotch's special plea and whether he "was suffering from a severe mental disease or defect

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[13] *See, as to inconsistent verdicts, People v. Florida*, Crim. No. 96-00060A (D. Guam App. Div. April 21, 1997) (when the jury was presented with separate verdict forms for aggravated murder and three lesser-included offenses, it was held to be reversible error to include not guilty by reason of mental disease or defect as an option only on the aggravated-murder verdict form).

of the mind which caused him to be unable to appreciate the nature and quality or wrongfulness of his acts . . . ." (R. 1404-05.)

The trial court thereafter instructed the jury concerning the verdict forms, and it stated that the jury was to determine guilt as to the capital offenses, then if the jury found Dotch not guilty as to those offenses, it was to consider the lesser-included offenses. The trial court further charged that, if the jury found Dotch guilty of any of the possible offenses, it should then consider a verdict of not guilty by reason of mental disease or defect. (R. 1417-20.)

Later, during deliberations, the jury submitted a question to the trial court, which Dotch contends evidences the jury's confusion. The following transpired at trial:

> "THE COURT: All right. Y'all have a seat, please. I've been handed a note which says, 'Do we need to come up with a verdict on both counts of capital murder? In other words, do both forms need to be filled out?' And the answer is yes. As I've said earlier today, the jury is to consider all the evidence, and if you are convinced beyond a reasonable doubt that the State has met that burden of proof, then it would be your duty to find the Defendant guilty of that count. The other side of the coin is, of course, on either or both counts, you are not satisfied beyond a reasonable doubt, then you would find the Defendant not guilty. So, you can have a guilty on both counts of the indictment, not guilty on both counts of the indictment, or guilty on one count and not guilty on the other count, but one of them cannot be left blank. Makes sense, I hope."

(R. 1425-26.)

The trial court asked if the parties had any exceptions to this instruction to the jury. Defense counsel responded that the jury did not mention to which verdict form it was referring and the trial court failed to mention the verdict form for not guilty by reason of mental disease or defect. (R. 1426.) The trial judge stated that he "just responded to the question. The question asked, concerning the capital murder, do we need to fill out both forms." (R. 1426.) Defense counsel stated that the not-guilty-by-reason-of-mental-disease-or-defect form should be included, and he requested its inclusion in the charge to the jury. The trial court responded, "I think that's really beyond the question they asked." (R. 1427.)

The propriety of the verdict forms, the trial court's initial charge concerning the verdict, and the trial court's instructions in response to the jury's question submitted during deliberations will each be discussed.

A.

There is no law in Alabama requiring that the jury be provided with verdict forms of not guilty by reason of mental disease or defect as to each charged offense or that this verdict be contained on the same form as the charged offense. *Compare People v. Rhoads*, 73 Ill. App. 3d 288, 315, 391 N.E. 2d 512, 531-32 (1979) (holding that although an Illinois statute required that the jury be provided with not-guilty-by-reason-of-insanity verdict form for each charged offense, Rhoads had waived this issue by failing to object and the error was harmless because the charged offenses arose out of the same act so that "the possibility would be slim" that the jury would find him insane as to only one of the offenses).

Pursuant to Rule 23.2(b), Ala.R.Crim.P., "[w]hen the jury determines that the defendant is not guilty by reason of mental disease or defect, the verdict shall so state." Moreover, "[a] plea of insanity shall not preclude the usual plea of the general issue, which shall not put into question the issue of the irresponsibility of the accused by reason of his alleged insanity, this question being triable only under the special plea." § 15-16-1, Ala. Code 1975.

As to verdict forms, Rule 23.3, Ala.R.Crim.P., requires that "[f]orms of verdict shall be submitted to the jury for each offense charged, and where warranted by the evidence, for all offenses necessarily included in each offense charged." The trial court has the authority under this rule to correct or to complete the verdict as to form in open court. There is no requirement that a verdict of not guilty by reason of mental disease, where pleaded, be included on the separate verdict forms for charged or included offenses. Thus, in the present case, the trial court did not err in submitting only one not-guilty-by-reason-of-mental-disease-or-defect verdict form to the jury.

B.

Moreover, the trial court's instructions were not incorrect and did not confuse or mislead the jury. The judge's original instructions concerning the jury's use of the verdict forms were correct. As the court stated, the jury should first determine guilt as to the offenses, and if it found Dotch guilty, then the jury was to determine whether Dotch was not guilty by reason of mental disease or defect.

According to § 15-16-24, Ala. Code 1975:

> "If it shall appear from the evidence that a defendant did the act charged as constituting the

> offense, but at the time of committing the act he was insane, the jury shall render a special verdict to the effect that the defendant is not guilty by reason of insanity, but if the jury does not believe from the evidence that the defendant committed the act or if it believes from the evidence that he is not guilty upon any ground other than his alleged insanity, it must return a general verdict of not guilty; otherwise, it must return a verdict of conviction."

The trial court's original instructions substantially followed the Alabama Pattern Jury Instructions. *See* Alabama Pattern Jury Instructions: Criminal 1.9 (3d ed. 1994) ("[I]f you find that the State has proved beyond a reasonable doubt each of the elements of the offense charged, then you must go further and consider the defendant's defense that he nevertheless is not criminally responsible as a result of a severe mental disease or defect."). "The appellate courts of this state endorse the use of the Alabama Pattern Jury Instructions in criminal cases." *Ex parte McGriff*, 908 So. 2d 1024, 1033 (Ala. 2004). *See also Zeigler v. State*, 886 So. 2d 127, 145 n.7 (Ala. Crim. App. 2003), *cert. denied*, 543 U.S. 863 (2004) ("We encourage trial courts to use the Alabama Pattern Jury Instructions-Criminal adopted by the Alabama Supreme Court for use in capital cases."); *Wesley v. State*, 575 So. 2d 108, 116 (Ala. Crim. App. 1989), reversed on other grounds, 575 So. 2d 127 (Ala. 1990) (jury charge that Wesley was presumed sane, which "substantially track[ed] the language found in Alabama Pattern Jury Instructions, Criminal, IIID-2 (1980)," was proper).

Dotch cites two sentences by the trial court during these instructions that he claims confused the jury.

After the trial court charged the jury that it should first consider the charged offenses, it stated, "If you find guilt on one or both of those offenses, that will be your verdict. *That will be it. You stop there.*" (R. 1398; emphasis added.) The court, however, gave the following charge immediately after, "If you find the State has failed to prove beyond a reasonable doubt the elements of both of those charges, then you'll go to the first lesser included of murder, which I've just charged you." (R. 1398.)

Dotch has pulled the two emphasized sentences out of context. The trial court sequentially instructed the jury as to its duty in arriving at its verdict, including its consideration of Dotch's special plea if the jury were to find him guilty of a charged or a lesser-included offense.

> "'A trial court has broad discretion when formulating its jury instructions. *See Williams v. State*, 611 So. 2d 1119, 1123 (Ala.Cr.App. 1992). When reviewing a trial court's instructions, "'the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together.'" *Self v. State*, 620 So. 2d 110, 113 (Ala.Cr.App. 1992) (quoting *Porter v. State*, 520 So. 2d 235, 237 (Ala.Cr.App. 1987)); *see also Beard v. State*, 612 So. 2d 1335 (Ala.Cr.App. 1992); *Alexander v. State*, 601 So. 2d 1130 (Ala.Cr.App. 1992).'
>
> "*Williams v. State*, 795 So. 2d 753, 780 (Ala. Crim. App. 1999)."

Robitaille v. State, 971 So. 2d 43, 74 (Ala. Crim. App. 2005), *cert. denied*, 552 U.S. 990 (2007).

C.

As to the charge given the jury in response to its question posed during deliberations, the trial judge stated that his instruction in response was formulated so as to be strictly confined to the precise question asked. The question asked by the jury was: "Do we need to come up with a verdict on both counts of capital murder? In other words, do both forms need to be filled out?" The trial judge properly responded in the affirmative and explained that the verdict forms as to each count had to be completed to indicate whether the jury found Dotch guilty or not guilty as to each count. He had already instructed the jury that the special plea would be considered if the jury entered a verdict finding Dotch guilty in any charge. The jury's question did not address that matter.

The trial court properly informed the jury that the jury must first determine guilt as to each offense charged in the indictment. As to the required marking of the verdict forms, Rule 23.2, Ala.R.Crim.P. addresses the necessity for verdict forms, and the commentary thereto states that "[t]he rule places on the court the responsibility of deciding what verdicts the jury may return, restricting the jury to returning verdicts for which verdict forms have been submitted to it." There is no requirement that each form must be marked if the jury finds that the defendant is not guilty of one offense or as to the exact structure, design, or layout of the verdict forms. *See Beasley v. State*, 269 Ga. 620, 623, 502 S.E. 2d 235, 239 (1998) (finding no error when "the verdict form contained nothing more than a blank space underneath each charge, and the jurors were to specify in those spaces

whether Beasley was guilty or not guilty of each charge.").

Because the trial court properly and clearly informed the jury of its duty in reaching its verdict or verdicts, the trial court did not abuse its discretion and there was no error here.

> "'"The trial court is vested with broad discretion in formulating its charge, so long as it accurately reflects the law."' *Powers v. State*, 963 So. 2d 679, 691 (Ala. Crim. App. 2006), (quoting *Clark v. State*, 621 So. 2d 309, 324 (Ala. Crim. App. 1992)). *See also Williams v. State*, 795 So. 2d 753, 780 (Ala. Crim. App. 1999). 'When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them. Ingram v. State, 779 So. 2d 1225 (Ala.Cr.App. 1999).' *Johnson v. State*, 820 So. 2d 842, 874 (Ala. Crim. App. 2000)."

Marshall v. State, 20 So. 3d 830, 836 (Ala. Crim. App. 2008), *cert. denied*, __ U.S. __, 130 S.Ct. 635 (2009).

Further, Dotch suffered no prejudice as to the form of the verdicts. *See State v. Huth*, 334 N.W.2d 485, 491 (S.D. 1983) (five verdict forms, including three guilty forms as to three offenses, a not-guilty form, and a not guilty by reason of mental illness form, "were proper and adequate when considered with the instructions to the jury as a whole and the testimony presented during the trial").

VI.

Dotch argues that the State violated the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986), by improperly striking African-American veniremembers. Specifically, Dotch submits that the record raises an inference

that the State engaged in purposeful discrimination because the State struck 10 of the 14 African-American potential jurors while defense counsel did not strike any African-American potential jurors. The jury consisted of eight white and four African-American jurors.

However, the record reveals that Dotch raises this issue for the first time on appeal. Rule 45A, Ala.R.App.P. At trial, he failed to object to the strikes by the prosecutor on the ground of racial bias; he did not establish a prima facie case of discrimination; and he did not request that the prosecutor come forward with reasons for her strikes.

> """"For plain error to exist in the Batson context, the record must raise an inference that the state [or the defendant] engaged in 'purposeful discrimination' in the exercise of its peremptory challenges. *See Ex parte Watkins*, 509 So. 2d 1074 (Ala.), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).""
>
> "'*Smith v. State*, 756 So. 2d 892, 915 (Ala. Crim. App. 1998), aff'd, 756 So. 2d 957 (Ala. 2000) (quoting *Rieber v. State*, 663 So. 2d 985, 991 (Ala. Crim. App. 1994), quoting in turn other cases).'
>
> "*Ex parte Walker*, 972 So. 2d at 742."

Ex parte Sharp, [Ms. 1080959, December 4, 2009] __ So. 3d __, __ (Ala. 2009).

A.

Dotch argues that the record presents an inference of discrimination on the part of the State because it used three of its strikes to remove African-American

potential jurors although white potential jurors with the same characteristics or who answered questions similarly were not removed.

He first cites one potential African-American juror who he alleges had the same characteristics as a white juror who was not struck by the State; specifically, he was married, worked in the medical field, and recognized some of the potential witnesses. However, unlike the white potential juror who Dotch says shares similar characteristics, the African-American veniremember worked at Searcy Mental Facility, where Dotch had been treated, and worked with two of the State's witnesses—a police officer and a psychiatrist. She stated that the psychiatrist was a supervisor at her workplace. (R. 408-10.) She stated that he was not her immediate supervisor but that he could write a letter of recommendation or reprimand concerning her. (R. 409.) The record indicates that the prosecutor also removed a white potential juror who had a friend who worked at Searcy Medical Facility. (R. 466.)

The second African-American cited for disparate treatment was born in the same year as a white veniremember, who also retired from one job but continued to work. However, the State in its brief responds to this claim by noting that the struck juror's professional background was as an educator and counselor, as opposed to the white potential juror who had worked for a paper company. The State submits that, because the death penalty was being sought, a counselor and educator might be more inclined to rehabilitation.

This reason has been held to be invalid as a race-neutral reason for striking. Although the fact that a veniremember is a teacher or college counselor alone

has been held to be an insufficient reason for striking a potential juror, *see Williams v. State*, 548 So. 2d 501, 506 (Ala. Crim. App. 1988), *cert. denied*, 489 U.S. 1028 (1989) (college counselors); *McGahee v. State*, 554 So. 2d 454, 461 (Ala. Crim. App. 1989), *affirmed*, 554 So. 2d 473 (Ala. 1989), *after remand*, 632 So. 2d 976 (ala. Crim. App. 1993), *affirmed*, 632 So. 2d 981 (Ala. 1993), *cert. denied*, 514 U.S. 1078 (1995) (teachers), in some cases these may be sufficient reasons. Assumptions about professions without more is suspect; however, where white veniremembers were struck for the same reasons, there is no disparate treatment and the reasons can be validly race neutral. Here, the prosecutor also struck a white potential juror who worked with Good Will Easter Seals and another white potential juror who had worked with the Mobile Association for Retarded Citizens for 10 years. (R. 467, SSR. 33, 34.) The prosecutor also struck a white potential juror who worked for MidSouth Home Care (SSR. 34) and a white veniremember who worked as an admissions recruiter for the Alabama School of Math and Sciences. (R. 267, 628.)

Moreover, this veniremember stated in her jury questionnaire that her graduate studies required readings in psychiatry, psychology, and mental health or retardation; she also stated that she was interested in these studies. Because Dotch raised the affirmative defense of not guilty by reason of mental disease or defect, the veniremember's outside studies may have interfered with her objectivity.

As to the last strike of an African-American potential juror cited by Dotch, he argues that this veniremember, like another white veniremember who was not struck by the State, was married, worked for

Mobile County, and remembered a few details of the offense from the media. However, the African-American veniremember stated that she worked for the Mobile County Health Department,[14] which, as a result of Dotch's special plea, might have influenced her in deciding this case. The white veniremember worked for the Revenue Commissioner's Office. Moreover, as previously stated, the prosecutor also struck white veniremembers who worked for health-care establishments, specifically, the Mobile Association for Retarded Citizens and MidSouth Home Care. Thus, the record provides nonracial reasons for these strikes.

B.

Dotch also alleges that the State engaged in a pattern of striking African-American veniremembers that indicated racial bias; however, he refers only to the percentage of potential African-Americans jurors struck by the State and the percentage of the State's strikes used to eliminate African-American potential jurors. Moreover, as Dotch notes in brief, before the removal of veniremembers for cause, there were 57 whites and 18 African-Americans on the original panel of 75, 76 percent and 24 percent, respectively. However, the jury consisted of 8 whites and 4 African-Americans, 67 percent and 33 percent, respectively, so that the percentage of African-Americans on the jury was actually higher than the percentage of African-Americans on the venire.

Dotch further submits that the Mobile district attorney's office has a long history of *Batson* violations,

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[14] Another potential juror, who was white, worked for the Mobile County Health Department; however, she was removed for cause.

although this was not reflected in, or indicated by, the record. *See Sharifi v. State*, 993 So. 2d 907, 928 (Ala. Crim. App. 2008) (no inference from the record of discriminatory use of peremptory challenges by the prosecutor despite Sharifi's argument that Madison County has a long history of violating *Batson* and that the number of strikes used by the State indicated prejudice). Further, in its brief on appeal, the State argues that none of the cases cited by Dotch as indicating a history of discrimination occurred within the last decade or involved the prosecutor in Dotch's case. (State's brief 69.)

Dotch also contends that prejudice is indicated because the 10 African-Americans struck by the State were heterogeneous; 4 were men and 6 were women. However, varying gender alone does not indicate that race was the reason for the strikes. There is no argument that these potential jurors were in all other respects heterogeneous as the community as a whole. *Ex parte Branch*, 526 So. 2d 609, 622 (Ala. 1987).

E.

Finally, Dotch contends that four of the African-American veniremembers removed by the State did not make any response during voir dire that would provide a basis for being struck. However, two of those jurors were the same jurors Dotch argued had been removed by disparate treatment: one who worked for the Mobile County Health Department and one who had worked as a counselor and educator through the Boys and Girls Club of America. *Compare Brown v. State*, 982 So. 2d 565, 586 (Ala. Crim. App. 2006), cert. denied, __ U.S. __, 128 S.Ct. 1893, (2008) (strike of potential juror who had a nephew and grandson with mental problems held to be race neutral where Brown had been treated for

mental disease); *Bass v. State*, 585 So. 2d 225, 237 (Ala. Crim. App. 1991) (upholding the trial court's decision that the striking nurse because she had relatives who had suffered a nervous breakdown was a race-neutral reason under the circumstances of the particular case). Moreover, as previously stated, white potential jurors were struck for the same or similar reasons as these two African-American veniremembers. Thus, there was no disparate treatment or indication that the strikes were based on race.

As to another potential juror struck by the State, he argues that the record reveals only that she was employed as a maintenance worker at University of South Alabama. However, she responded to questioning that she and another potential juror knew each other, and the record shows that the other veniremember, who was white,[15] was also struck by the prosecutor.[16] (R. 508.)

Dotch also cites the prosecutor's striking of a potential juror the strike list shows to have been the oldest juror at 74 years old. Although age alone as a reason for striking may be suspect, it also may be sufficient to overcome a challenge under Batson, when coupled with other factors indicating difficulty in serving as a juror. Moreover, where white jurors were also struck because of age, there is an indication of a lack of racial motivation behind the strike. Here the record shows that other elder veniremembers (both white, a male and a female aged 71 and 73,

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[15] *See* SSR. 33.

[16] The record reveals that the prosecutor used her second strike to remove the potential juror known by the cited juror, and the next strike was used to remove the cited veniremember.

respectively) were also struck by the prosecutor. Although one veniremember who was a 73-year-old white female was removed by Dotch, he used his first strike to do so.

Moreover, the record indicates that this potential juror was called before the judge and parties for individual questioning because she had failed to sign the juror questionnaire. (R. 448.) She stated that she forgot to do so, and the prosecutor asked if she had received any help in filling out the questionnaire; she responded that she had not. (R. 448.) Thereafter, the prosecutor questioned this potential juror as follows:

> "[Prosecutor]: Okay. You put a bunch of X's. Does that mean you have—you don't have an answer to those questions or did you have trouble reading the questions or—
>
> "[Potential juror]: Yes, ma'am.
>
> "[Prosecutor]: Did you have any trouble reading any of the questions?
>
> "[Potential juror]: I did not."

(R. 449.)

It is clear from her questioning that the prosecutor believed that this potential juror might have trouble serving on the jury. *See Acklin v. State*, 790 So. 2d 975, 988-89 (Ala. Crim. App. 2000), *cert. denied*, 790 So. 2d 1012 (Ala. 2001), *cert. denied*, 533 U.S. 936 (2001) (where potential juror appeared to be unable to read or write, the prosecutor's reason for the strike was race neutral).

In *Ex parte McNair*, 653 So. 2d 353 (Ala. 1994), *cert. denied*, 513 U.S. 1159 (1995), the Alabama Supreme Court addressed a similar situation and stated:

> "The prosecutor stated that he had stricken juror Leonard on the ground that he was 82 years old and 'slow,' and jurors Bracken, Brady, Rivers, and Thomas, on the ground that they were too young (*i.e.*, too close in age to McNair). Age may serve as a legitimate racially neutral reason for a peremptory strike, *see Jelks v. Caputo*, [607 So. 2d 177 (Ala. 1992)]; *Harrell* [*v. State*, 555 So. 2d 263, 268, n. 1 (Ala. 1989)]; *Ex parte Bird*, 594 So.2d 676 (Ala.1991); especially when, as with Leonard, the age of the individual, when coupled with his demeanor, indicates inattentiveness and a general inability to follow the progress of the trial. *See Nesbitt* [*v. State*, 531 S.2d 37 (Ala.Crim.App. 1987)]. The record also indicates that the prosecutor struck whites within the same age group as jurors Bracken, Brady, Rivers, and Thomas. Again, this consistency indicates racially neutral striking on the prosecutor's part."

653 So. 2d at 357. *See also Ex parte Dunaway*, 746 So. 2d 1042, 1046 (Ala. 1999), *cert. denied*, 529 U.S. 1089 (2000).

Thus, these were valid nonracial reasons for striking the potential jurors as to whom Dotch asserts a Batson challenge. "'Within the context of *Batson*, a "race-neutral" explanation "means an explanation based on something other than the race of the juror."'" *Riley v. State*, 875 So. 2d 352, 355 (Ala. Crim. App. 2003), quoting *Allen v. State*, 659 So. 2d 135, 147 (Ala. Crim. App.1994), quoting in turn, *Hernandez v. New York*, 500 U.S. 352, 360(1991). Here, there were valid nonracial reasons for the prosecutor's strikes, and a review of the record does not indicate any racial bias or discriminatory purpose behind the

prosecutor's removal of the African-American prospective jurors.

VII.

Dotch argues that the trial court improperly removed a juror for cause who could have listened to the judge's instructions and who could have been impartial in evaluating the evidence and arriving at a decision.

The record indicates that the potential juror was removed by the trial court after extensive questioning. The judge determined that the veniremember could not, and would not, work with or listen to other people when dealing with an important matter about which he had an opinion. For this reason, the trial court decided that the potential juror could not perform the duties required of a fair and proper juror. Therefore, the trial court removed the veniremember from the panel.

The following transpired at trial:

> "[Potential juror]: Really, I have nothing against the death penalty or a capital case, but when I walked in, my first impression was I said I'd never—I don't believe I could give the panel, the other people and me, just team up with them and do it.
>
> "THE COURT: Say that a little bit—
>
> "[Potential juror]: I'm a person that I raise animals. I stay with animals. I'm not around a lot of people and I don't believe I could agree with 11 other people on most anything. I mean, that's the honest—
>
> "THE COURT: I appreciate your candor. I'm just not sure what to do with it.

"[Potential juror]: Well, I don't know what to do with it either, but that's me. That's the way I am. I've been doing it a long time.

"THE COURT: That's fine.

"[Potential juror]: And I just don't see where I could sit with 11 other people and render that kind of sentence that has to be done.

"' . . . .

"[Potential juror]: I can't—I cannot say that I can sit there with 11 other people and weigh all the evidence because I don't think I'm capable of doing it. I mean, I just—I've been a loner all my life and I just don't see how I could get together with that. Coming down to me having to make that decision, I just couldn't.

"THE COURT: You couldn't participate in that process or wouldn't?

"[Potential juror]: I could not. " . . . .

"THE COURT: He's leaning like he's having a little difficulty hearing you. Speak up so I can hear you too.

"[Prosecutor]: We asked a question on the questionnaire, is there any information about which you feel the Judge and the attorneys should know in reference to your ability to serve as a juror, and you said yes. And you said I have a tendency to think that a lot of people don't tell the truth. What exactly did you mean by that?

"[Potential juror]: I have a tendency to know that people do not always tell the truth. I'm not talking about witness—I am the type person I don't—I don't like sympathy or whatever,

emotional stuff, and when it comes down to bare facts, when lawyers ask the question and then the witness can't—don't make the answer, then I feel like it's something that should have been said and I get that—I said, well, I ain't heard all I need to know. And I know that's the way trials are run, but that's why I say I don't believe I need to be part of it.

"THE COURT: All right. [Defense counsel]?

"[Defense counsel]: [Potential juror], you said you don't really have anything against the death penalty; is that right?

"[Potential juror]: No.

"[Defense counsel]: So, that would be something if you wound up in that—you know, in the jury, you would at least be able to consider that, wouldn't you, if you got to that point?

"[Potential juror]: No.

"[Defense counsel]: You don't think there's any —I'm sorry. Go ahead.

"[Potential juror]: When I walked through the door, I took a mental picture of this room, the people sitting around. I said, no, I can't do it. I'm not going to do it. That's just as honest as I can be.

"[Defense counsel]: I appreciate that. And we all do. This isn't something anybody wants to do.

"[Potential juror]: That's the reason I say I don't want to waste the Court's time with putting me in a situation where I'm not going to be able to sit and discuss because part of the people that I'll be discussing this with won't be the same

kind of people I am. I'm talking about like I was a construction worker all my life and these other people probably be better educated than I am, and I just don't feel like I'll be able because—

"THE COURT: Okay.

"[Defense counsel]: Would you be able to listen to the Judge's instructions and follow those?

"[Potential juror]: I can listen to his instructions and follow those as long as I can remember, but I can't remember a lot of details and I don't want to have a detail—I do have a little hearing problem too, especially when the lady was doing the talking.

"[Defense counsel]: Let me ask you this because, I mean, that's why you have the jury of 12 people because nobody is going to remember all the details, no one person. And understanding that whatever decision that you felt was right would be your sole decision, you don't have to, you know, agree with everybody else. It's not necessary that you agree with everybody else. It's whatever [Potential juror] feels is right based upon the evidence that you heard. Could you do that?

"[Potential juror]: Well, the Judge yesterday—We have to have a lot of patience, and I don't have a lot of patience. I mean, that's just me. And if I got on the panel when some people had some reason why that they—that I didn't think they was going to deal straight, then we just wouldn't get along. That's my problem. And I don't want to get into that situation."

(R. 334-39.)

Thereafter, outside the presence of the potential juror, the following discussion was had by the parties and the trial court:

"THE COURT: [Potential juror] poses a bit of a unique situation, and what I thought was very straightforward is that as far as the deliberation process and listening to other people and sharing views, he, as a whole, said that not only could he not do that, he would not do that. And I don't think that would be fair to [Dotch] or to the State to have someone that would not be willing to listen to other jurors' views.

"[Prosecutor]: He's a Court strike, right?

"THE COURT: I think he's unqualified to serve on the jury, so I will not require y'all to make a challenge.

"[Defense counsel]: Your Honor, we would except to him being struck.

"THE COURT: That's fine. Let me just amplify for the moment for the record, it's not that he had a strong view, it's not that he would be a man to strike for his view. That's not the issue. But like in a dynamite charge, you tell people listen to everyone else's point of view and consider everyone else's point of view without sacrificing your own opinions. [Potential juror] seemed, by his demeanor, his appearance in court seemed to be very emphatic that he would have an opinion and that's all that he would consider during deliberations and he could not participate in the give and take.

"He indicated that he has a lack of patience with people that disagree with him. He said that

he doesn't think people tell the truth, and he said he has a hard time hearing women. We have two State attorneys. I'm going to remove him over your exception.

"[Defense counsel]: Judge, if I might just make sure I have the record clear. By way of reasons for our exception, the man said he could listen to your instructions. He did say that he didn't know if he would—could go along with everybody else, and I would submit that that's not a juror's duty to go along with everybody else. Each person has to reach their own decision ever how it is, and he did not—as the Court said, he seemed to have a pretty definite idea about how he would function.

"But he's distrustful. I submit that's not a bad quality in a juror, that they should question the evidence. They should question in their mind the witnesses, their motivation, their ability to recall and relate whatever it is they're testifying about, and I think he has not demonstrated sufficiently that he is unqualified or unwilling to serve as a juror and we would, therefore, except to the Court's ruling."

(R. 340-42.)

Although Dotch points to and isolates the potential juror's statements indicating that he could listen to and follow the trial court's instructions, the veniremember was consistent and clear in stating that he could not serve in a group context in which he would be required to listen to other people's opinions, to compromise, or to evaluate and exchange ideas and opinions. It was for this reason that the trial judge who was in a position to observe the veniremember's

demeanor and to listen to his explanations removed the potential juror.

"The jury's role in a trial is to ""assure a fair and equitable resolution of factual issues."" [*United States v.*] *Richardson*, 233 F.3d 1285,] 1289 [(11th Cir. 2000)] (quoting *Standard Oil Co. of California v. Arizona*, 738 F.2d 1021, 1031 (9th Cir. 1984), quoting in turn *Colgrove v. Battin*, 413 U.S. 149, 157, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973)). . . . Proper communication is necessary for a jury to correctly fulfill its fact-finding duty . . . ."

Ex parte Malone, 12 So. 3d 60, 63-64 (Ala. 2008).

Group interaction and deliberation by jury members promotes, and is essential to, the fact-finding process. As stated in *People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981):

> "[T]he term 'jury' connotes a deliberative body of persons. The word 'jury' has been defined as:
>
> > "'A body of men sworn to give a verdict upon some matter submitted to them; . . . a body of men selected according to law, impaneled and sworn to inquire into and try any matter of fact, and to give their verdict according to the evidence legally produced.' Webster's *Third New International Dictionary*, 1966.
>
> "*See also Black's Law Dictionary* 993 (rev. 4th ed. 1968); *Williams* [*v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed. 2d 446 (1970)]; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965).

"In *Williams*, *supra*, the Supreme Court speaking to the size of a jury stated:

> "'. . . the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. . . .'

"It is thus obvious that a jury may not be composed of a single person. If the accused desires a one person determination of his guilt or innocence, he may waive the jury and be tried by the court."

634 P. 2d at 46-47.

Here, the trial court removed a potential juror who honestly confessed that he was unable and unwilling to serve as a fair and effective juror as far as deliberating with the other jurors. Whether a prospective juror is qualified to serve as a member of a jury is a matter within the discretion of the trial court. "This determination, again, is to be based on the juror's answers and demeanor and is within the sound discretion of the trial judge." *Knop v. McCain*, 561 So. 2d 229, 232 (Ala. 1989.) "This Court must look to the questions propounded to, and the answers

given by, the prospective juror to see if this discretion was properly exercised. . . . A reversal is not appropriate absent abuse of this discretion." *Ex parte Ellington*, 580 So. 2d 1367, 1369 (Ala. 1990). The trial court in the present case did not abuse its discretion by removing this potential juror from the panel.

VIII.

Dotch argues that the trial court produced a conviction-prone jury by death-qualifying the venire and thereby denied Dotch his right to a fair trial. Specifically, he contends that death-qualifying a jury results in an impartial jury for the following reasons: because such juries are significantly more prone to convict the defendant; because pretrial death-qualification assumes a defendant's guilt, causing the jury to be "condition[ed]" toward guilt; and because death-qualification disproportionately excludes minorities and women.[17] (Dotch's brief, at 109.)

In *Lockhart v. McCree*, 476 U.S. 162 (1986), the United States Supreme Court held that veniremembers in a capital-murder trial may be "death-qualified" to determine their views on capital punishment. The appellate courts in Alabama have repeatedly applied the Lockhart holding. As this Court stated in *Sockwell v. State*, 675 So. 2d 4 (Ala.Crim.App. 1993):

> "'In *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court held that the Constitution does not prohibit states from "death qualification"

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[17] Although Dotch did not specifically raise the ground of exclusion of minorities and women by death-qualifying the jury in his pretrial motion, he did argue that the practice denied him the right to a fair cross-section of the community on his jury. (C. 174.)

> of juries in capital cases and that so qualifying a jury does not deprive a defendant of an impartial jury. 476 U.S. at 173, 106 S.Ct. at 1764. Alabama Courts have consistently held likewise. *See Williams v. State*, 556 So. 2d 737 (Ala. Crim. App. 1986), *rev'd in part*, 556 So. 2d 744 (Ala. 1987); *Edwards v. State*, 515 So. 2d 86, 88 (Ala. Crim. App. 1987); *Martin v. State*, 494 So. 2d 749 (Ala. Crim. App. 1985).'
>
> "675 So. 2d at 18."

Lee v. State [Ms. CR-07-0054, October 9, 2009] __ So. 3d __, ___ (Ala. Crim. App. 2009).

In *Sneed v. State*, 1 So. 3d 104 (Ala. Crim. App. 2007), cert. denied, __ U.S. __, 129 S. Ct. 1039 (2009), Sneed raised the same issues Dotch raises, and this court found no merit to his claims, stating:

> "The appellant also argues that death-qualifying a jury is unconstitutional because the jurors are more prone to convict, it assumes that the defendant is guilty, and it disproportionately excludes minorities and women. In *Davis v. State,* 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (opinion on return to remand), *aff'd*, 718 So. 2d 1166 (Ala. 1998), we stated:
>
> > "'A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. *Williams v. State*, 710 So. 2d 1276 (Ala.Cr.App. 1996). *See Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct.

> 1758, 90 L.Ed. 2d 137 (1986). Neither the federal nor the state constitution prohibits the state from [ ] death-qualifying jurors in capital cases. *Id.*; *Williams; Haney v. State*, 603 So. 2d 368, 391-92 (Ala.Cr.App. 1991), *aff'd*, 603 So. 2d 412 (Ala. 1992), *cert. denied*, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed. 2d 687 (1993).'
>
> "(Footnote omitted.) Therefore, the appellant's argument is without merit."

1 So. 3d at 136-37.

Therefore, these issues have previously been determined adversely to Dotch's arguments, and there is no merit to these claims.

IX.

Dotch alleges that the trial court improperly admitted gruesome and unduly prejudicial photographs of the victim, which, he says, requires that his conviction be overturned. Dotch refers to crime-scene and autopsy photographs without specifying the exact photographs that he found unduly prejudicial.

Moreover, Dotch did not object to the introduction of any of these photographs at trial nor did he raise this claim in any motion before the trial court. (R. 687-88.) Therefore, any error must rise to the level of plain error. Rule 45A, Ala.R.App.P.

Dotch simply argues that because the cause of the Taldon's death was undisputed, the probative value of the photographs was outweighed by their prejudicial effect. "The fact that a photograph is gruesome is insufficient ground for its exclusion if, after proper authentication and identification, it tends to shed light on, strengthen, or illustrate the truth of other

material testimony. 6 Ala.Digest, Criminal Law 438; *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750 (1958); *McHugh v. State*, 53 Ala. App. 473, 301 So. 2d 238 (1974)." *Watts v. State*, 337 So. 2d 91, 92 (Ala. Crim. App. 1976) (photograph was illustrative of testimony concerning the nature and location of the wound and was properly admitted although the evidence was uncontroverted that shooting was the cause of death and Watts presented an insanity defense).

> "The fact that a photograph has very little probative value does not prevent its admission in evidence where the photograph will tend to shed light on, strengthen or illustrate the truth of other testimony, or where the photograph has reasonable tendency to prove or disprove some material fact or issue in the case, or is used to identify the deceased or to illustrate the location, nature or extent of a wound. *Gilmore v. State*, 346 So. 2d 1193 (Ala.Cr.App. 1977). The evidentiary rule in this state favors the admission of photographs and affords the trial court a wide and liberal latitude in the admission of photographs illustrative of a criminal transaction and the surrounding circumstances. *Arnold v. State*, 348 So. 2d 1092 (Ala.Cr.App. 1977), *cert. denied*, *Ex parte Arnold*, 348 So. 2d 1097 (1977); *Lewis v. State*, 339 So. 2d 1035 (Ala.Cr.App. 1976), *cert. denied*, 339 So. 2d 1038 (Ala. 1976)."

Lawrence v. State, 409 So. 2d 987, 990 (Ala. Crim. App. 1982).

A review of the photographs admitted, as well as the testimony concerning these photographs, shows that the photographs were properly admitted and were not overly prejudicial. They did not emphasize, exaggerate, or distort the victim's wounds, nor did

they misrepresent the crime scene. Further, they were illustrative of the crime scene and of the location of the victim's wounds. This evidence was relevant and was in dispute because Dotch contended that the victim may not have been in her vehicle when she was shot.

X.

Dotch argues that § 13A-5-40(a) (17), Ala. Code 1975, is unconstitutionally vague and overbroad. He alleges that there is no reasonable justification for imposing the death penalty when the victim of the shooting is inside a stationary vehicle but not when the victim is standing outside the same vehicle.

In *May v. State*, 710 So. 2d 1362 (Ala. Crim. App. 1997), this Court upheld the constitutionality of § 13A-5-40(a) (17) against a claim that the statute violates a defendant's rights to equal protection. In so doing, this Court held:

> "The only act made capital by § 13A-5-40(a) (17), Ala. Code 1975, is the intentional murder of a person in a vehicle. 'Murder is not a constitutionally protected activity.' *Ex parte Woodard*, 631 So. 2d 1065, 1068 (Ala.Cr.App. 1993), *cert. denied*, 662 So. 2d 929 (Ala.), *cert. denied*, 513 U.S. 869, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994). Even so, there is a rational basis for the legislature's recognition of killers whose victims are killed while in a vehicle as a separate class, and making that offense punishable by either life imprisonment or the death penalty. The facts in the instant case serve well to demonstrate one rational basis which the legislature could have considered in enacting the statute. Marcum, suffering a mortal wound, attempted to drive from

> the scene of the shooting. He lost control of the car and crashed into other vehicles parked nearby. Fortunately, no one else was injured by the runaway vehicle in this instance.
>
> "Here, the classification by the legislature of the killer of a person in a vehicle as one guilty of a capital offense has a rational basis."

710 So. 2d at 1365. *See also Key v. State*, 891 So. 2d 353, 368 (Ala. Crim. App. 2002), *affirmed*, 891 So. 2d 384 (Ala. 2004), cert. denied, 543 U.S. 1005 (2004) (holding that Key would not have been entitled to relief on his claim that § 13A-5-40(a)(17) is unconstitutionally vague and arbitrary and that "to punish a defendant whose victim was sitting in a car differently from a defendant whose victim stumbled away from a car violated equal-protection principles" because this Court "has previously considered and rejected the constitutional arguments" raised by Key).

Moreover, this Court has affirmed the rationale for making § 13A-5-40(a) (17), Ala. Code 1975, a capital offense. In *Farrior v. State*, 728 So. 2d 691 (Ala. Crim. App. 1998), this Court wrote:

> "The facts in this case demonstrate one situation the legislature sought to address by enacting the statute. The appellant fired at McCombs' car several times. There were four people in the car, including two very young children. Another car driven by Nicole Jackson, who had her baby in the car, was nearby. Because of the mobile nature of a vehicle, there is an increased risk of harm to the driver, passenger, pedestrians, bystanders, and people in other vehicles if a person fires into a vehicle with a deadly weapon.

> Furthermore, the recent increase in drive-by shootings, carjackings, and other random acts of violence involving vehicles could have led the legislature to enact the statute. There are several fact situations that would serve as rational reasons for classifying this type of intentional murder as capital murder. Accordingly, as we held in *May* [*v. State*, 710 So.2d 1362 (Ala.Crim. App. 1997)] § 13A-5-40(a) (17) does not violate the appellant's equal protection rights."

Farrior v. State, 728 So. 2d at 701.

Because a rational basis exists for making the intentional killing of a victim who is inside a vehicle a capital offense, Dotch's claim of unreasonableness is without merit. Moreover, this statute is not overly broad or void as being too vague. *Compare Merrill v. State*, 741 So. 2d 1099, 1107 (Ala. Crim. App. 1997) (§ 13A-5-40(a) (18), Ala. Code 1975, which defines as a capital offense an intentional murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle, is constitutional despite Merrill's claim that the statute is vague for failing to "specify whether the vehicle must be operable or being driven and . . . fail[ing] to state whether the victim may be an occupant of the vehicle or must be outside the vehicle").

> "'To withstand a challenge of vagueness, a statute must: 1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and, 2) provide explicit standards to those who apply the laws. *Grayned* [*v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972)].

> "'"[T]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.' *Robinson v. United States*, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid."
>
> "'*Rose v. Locke*, 423 U.S. 48, 49-50, 96 S.Ct. 243, 244, 46 L.Ed.2d 185 (1975). "A defendant who challenges a statute on the ground of vagueness 'must demonstrate that the statute under attack is vague as applied to his own conduct, regardless of the potentially vague applications to others.'" *Senf v. State*, 622 So. 2d 435, 437 (Ala.Crim.App. 1993), quoting *Aiello v. City of Wilmington*, 623 F. 2d 845, 850 (3rd Cir. 1980). (Emphasis supplied [in *Culbreath*].)'"

State v. Randall, 669 So. 2d 223, 225-26 (Ala. Crim. App. 1995).

Here, the statute clearly notified Dotch of the prohibited conduct and provided explicit standards to prevent arbitrary or discriminatory enforcement. Thus, it was not unconstitutionally vague. Moreover, it does not prohibit, nor does Dotch actually claim that it prohibits, constitutionally protected conduct, so as to be overbroad. *Grayned v. City of Rockford*, 408 U.S. 104, 114-15, 92 S.Ct. 2294, 2302, 33 L.Ed. 2d 222 (1972).

Finally although Dotch argues in a separate issue (Dotch's brief, Issue XI) that the death penalty was disproportionate to the nature of this crime, this issue is also without merit. Dotch submits that his sentence was excessive because other defendants who were convicted of violating only § 13A-5-40(a)(17), Ala. Code 1975, had been sentenced to life imprisonment without parole where the facts more directly tied the victim to the vehicle. However, the facts and evidence supporting Dotch's conviction also support his sentence to death.

As this Court stated in *McGriff v. State*, 908 So. 2d 961 (Ala. Crim. App. 2000), *reversed on other grounds*, 908 So. 2d 1024 (Ala. 2004):

> "'Furthermore, the sentencing procedure for a person convicted of violating § 13A-5-40(a) (17), Ala. Code 1975, is constitutionally sound.
>
> > "'"A capital sentencing scheme must . . . provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" [*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)], quoting *Furman v. Georgia*, [408 U.S. 238, 313, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] (White, J., concurring).
> >
> > "'"'This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.'

> > > >

> on the defendant compared to others found guilty of murder." Second, the State may not limit the sentencer's consideration of any relevant evidence that might lead the sentencer to decline to impose the death penalty.
>
> """The required narrowing of the class of death-eligible defendants may occur at either the guilt or the sentencing phase of a capital trial. When narrowing is accomplished during the sentencing phase, the sentencer determines whether certain characteristics of the crime, known as aggravating circumstances, distinguish the gravity of the offense so as to justify the imposition of the death penalty.'"

"'*Woodard*, 631 So. 2d at 1070 (citations omitted).

> """ . . . ."
>
> " . . . .

"""[T]he legislature has clearly classified certain crimes as 'capital offenses,' § 13A-5-40, and it has set the minimum punishment for such crimes as imprisonment for life without parole, see §§ 13A-5-45(f); 13A-5-46(e) (1). This is no different from the legislature's classifying other offenses for purposes of punishment and establishing minimum and maximum punishments for each classification. *See* §§ 13A-5-53; 13A-5-6; 13A-5-7. A greater punishment-death- maybe imposed on a defendant convicted of a capital offense, but only if one or more of the aggravating

circumstances enumerated in § 13A-5-49 is found to exist and that aggravating circumstance(s) outweighs any mitigating circumstance (s) that may exist."

"' . . ."

"' . . . Thus, for a defendant to be sentenced to death upon conviction for violating § 13A-5-40(a) (17), the defendant must be guilty of the intentional murder committed through the use of a deadly weapon while the victim is in a vehicle "and the sentencer must find the existence of at least one of the aggravating circumstances enumerated in § 13A-5-49, thereby narrowing the class of 'death-eligible' defendants." *Woodard*, 631 So. 2d at 1070.

> "'"'[W]hen, in the opinion of the legislature, a class of victims require[s] special protection and the statutory scheme provides a meaningful method of narrowing the class of defendants who are death eligible, the statute is not constitutionally infirm.'"

"'*Woodard*, 631 So. 2d at 1072 (citation omitted). Alabama's capital sentencing scheme delineates a precise procedure to determine whether a defendant convicted under this statute will be sentenced to death or to life imprisonment without the possibility of parole. Furthermore, it narrows the class of "death-eligible" defendants. Accordingly, the procedure for sentencing a person convicted of violating § 13A-5-40(a) (17) withstands the appellant's challenges.'

> "*Farrior* [*v. State*], 728 So. 2d [691] at 701-03 [(Ala.Crim.App. 1998)] *See also Merrill v. State*, 741 So. 2d 1099 (Ala. Crim. App. 1997); *May v. State*, 710 So. 2d 1362 (Ala. Crim. App. 1997)."

McGriff v. State, 908 So. 2d at 1008-10.

Thus, because the sentencing procedures for a murder committed under § 13A-5-40(a)(17) are constitutionally sound and because the facts and evidence supported a finding that Dotch violated this statute, his sentence was proper. Moreover, other defendants in Alabama who have been convicted of violating this statute have been sentenced to death. *See, e.g., Key v. State*, 891 So. 2d 353 (Ala. Crim. App. 2002); *Knight v. State*, 907 So. 2d 470 (Ala. Crim. App. 2004).

Because § 13A-5-40(a)(17), Ala. Code 1975, is not unconstitutional as overly vague or overbroad and because it has a rationale for its application, Dotch's claims have no merit. Moreover, the death penalty in this case was not disproportionate as compared to the crime.

XI.

Dotch argues that the cumulative effect of errors committed at trial requires a reversal of his conviction and sentence. Dotch fails to specify any errors; rather he cites those he has previously argued in briefs.

> "The Alabama Supreme Court has set forth the cumulative-error rule as follows: '[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, if the accumulated errors have "probably injuriously

> affected substantial rights of the parties," then the cumulative effect of the errors may require reversal.' *Ex parte Woods*, 789 So. 2d 941, 942-43 n. 1 (Ala. 2001) (quoting Rule 45, Ala.R.App.P.)."

Lewis v. State, 24 So. 3d 480, 538 (Ala. Crim. App. 2006), *affirmed*, 24 So. 3d 540 (Ala. 2009), *cert. denied, Lewis v. Alabama*, U.S. __, 130 S.Ct. 796 (2009).

A careful and thorough review of the record as to the guilt and sentencing phases of Dotch's trial reveals no evidence that the cumulative effect of any of the alleged errors affected Dotch's substantial rights. *Brown v. State*, 11 So. 3d 866, 932 (Ala. Crim. App. 2007), *affirmed*, 11 So. 3d 933 (Ala. 2008), *cert. denied*, __ U.S. __, 129 S.Ct. 2864 (2009).

XII.

Dotch argues that the trial court erred in failing to find the existence of the statutory mitigating circumstance of his substantially impaired capacity based on the jury's rejection of his mental-disease-or-defect defense at the guilt phase of his trial. Specifically, Dotch argues that the standards for analyzing the affirmative defense of mental disease or defect and those for analyzing the mitigating circumstance of substantially impaired capacity differ. Therefore, he contends that the trial court improperly used the analysis for the affirmative defense in determining that the mitigating circumstance did not exist. Further, he alleges that because his burden in proving the mitigating factor was substantially less than that has burden in proving the affirmative defense, the trial court should have applied the correct standard and found that the mitigating circumstance existed.

The record indicates that the trial court made the following findings concerning the mitigating circumstance that Dotch's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," pursuant to § 13A-5-51(6), Ala. Code 1975:

> "Substantially Impaired Capacity: The defense injects this mitigator. Dr. Van Rosen testified the defendant has a full scale IQ. of 77 and suffers from a delusional disorder, polysubstance abuse and personality disorder. Dr. Van Rosen relied upon these diagnoses, the history of mental illness suffered by the defendant's mother, and the defendant's own history of mental treatment to support his opinion that the defendant suffered from a severe mental disease or defect at the time of the commission of the offense. The jury rejected the mental disease or defect defense in finding the defendant guilty of intentional murder. The State presented Dr. Douglas McKeown, a psychologist, who testified that the defendant's only mental difficulties resulted from his continuous use of cocaine. He diagnosed the defendant with personality disorder with antisocial features, polysubstance abuse, a history of possible thought disturbance, and low average intelligence. No evidence was presented to indicate cocaine abuse lowered the defendant's mental capacity or impaired his ability to understand 'the requirements of law,' or the consequences of his actions at the time of the murder.
>
> "The jury's rejection of the defendant's argument for a lesser-included conviction for manslaughter based on a voluntary intoxication

theory demonstrates that the jury believed the defendant was able to 'appreciate the criminality of his conduct' and that his ability to 'conform his conduct to the requirements of law was [not] substantially impaired.' In finding the defendant guilty of capital murder, the jury necessarily rejected the theory that he was so intoxicated by illegal drugs that he failed to form an intent to commit murder.

"The Court does not disagree with the jury's conclusion to reject the plea of insanity. The deliberate manner in which the defendant carried out the commission of the offense, coupled with a prior threat to commit the offense, does not demonstrate that the defendant suffered from a diminished mental capacity. The Court specifically finds the defendant was not substantially impaired in his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Accordingly, this statutory mitigator is found not to exist, and the Court gives it no weight."

(C. 565-67.)

Despite Dotch's claim, the judge's references to the evidence presented at trial and the jury's findings do not mean that the judge applied the wrong standard and used the incorrect analysis in considering this mitigating factor. In fact, the trial judge used the language included in the definition of the mitigating factor.

The prosecutor stated at the sentencing phase that he was introducing and relying on all the evidence that had been presented during the guilt phase. "Section 13A-5-47(d), Ala. Code 1975, requires a trial

court to consider the presentence report, along with the evidence presented during the guilt and penalty phases of the trial in determining whether aggravating and mitigating circumstances exist and how much weight they should be accorded." *Johnson v. State*, [Ms. CR-99-1349, October 2, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009). *Compare Spencer v. State*, [Ms. CR-04-2570, April 4, 2008] __So. 2d __, __ (Ala. Crim. App. 2008) (in which Spencer argued that because there was evidence at trial indicating that he had ingested cocaine, the trial court should have found that he was substantially impaired, and this Court determined that, "[a]lthough the evidence in the record supports the trial court's conclusion that the mitigating circumstance in § 13A-5-51(6), Ala. Code 1975, was not present, we question the propriety of the assertion that *'[t]here was no evidence* presented that Kerry Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired during the commission of this offense.' (Emphasis added.)").

A trial court is required to consider all the evidence offered for mitigation when sentencing a capital defendant. In *Lewis v. State*, 889 So. 2d 623 (Ala. Crim. App. 2003), this Court found that, although the trial court did not find the existence of the mitigating circumstances that Lewis had been of substantially impaired (§ 13A-5-51(6)) or that he had been under the influence of extreme mental or emotional disturbance (§ 13A-5-51(2)), the court properly considered all of the mitigating evidence. This Court stated:

> "Regarding the statutory mitigating circumstances that the offense was committed while Lewis was under the influence of extreme menta

> or emotional disturbance and that Lewis's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired, the court specifically stated that it had considered the 'great deal of evidence' that had been presented regarding Lewis's history of mental illness. (C. 14.) In addition, although the trial court did not find any nonstatutory mitigating circumstances to exist under § 13A-5-52, Ala. Code 1975, it indicated in its order that it had considered 'all of the evidence presented during all stages of the trial in this cause, as well as the Court's observation and evidence admitted during all proceedings, pretrial and posttrial.' (C. 14.) Based on its sentencing order, it is clear that the trial court fully complied with *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and its progeny in that it considered all evidence that could possibly have been considered mitigating."

889 So. 2d at 692.

Furthermore, although in *Lewis v. State*, 889 So. 2d at 693, Lewis also argued that the trial court "improperly applied the standard for insanity," by "specifically noting in its order that Lewis was aware of the wrongfulness of his actions and that he exercised his own volition in committing the crimes." However, this Court found no merit to that claim, stating that "[c]ontrary to Lewis's contention, merely because the court found that Lewis was aware of the wrongfulness of his actions and the criminality of his conduct does not mean that the court applied the standard of legal insanity to the mitigating evidence. *See, e.g., Ferguson v. State*, 814 So. 2d 925 (Ala. Crim. App. 2000), *aff'd*, 814 So. 2d 970 (Ala. 2001), *cert.*

denied, 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002) (holding that the trial court's statement in its sentencing order that Ferguson was not 'insane' did not show that the trial court applied the standard of insanity to Ferguson's proffered evidence of mitigation)." *Id.*

Here, there is no indication that the trial court used the analysis for determining legal insanity in determining the nonexistence of the mitigating circumstance that Dotch's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The record indicates that based on the evidence, the trial court determined that the State disproved the existence of the mitigating circumstance by a preponderance of the evidence. § 13A-5-45(g), Ala. Code 1975.

XIII.

Dotch argues that the trial court abused its discretion by excluding mitigation testimony from Dotch's family. Specifically, he contends that the trial court improperly ordered Dotch's brother and father to refrain from volunteering their opinions as to what the jury should recommend for sentencing and from asking for mercy. Dotch contends that the witnesses' opinions as to sentencing should have been admitted as mitigating evidence concerning Dotch's character.

In *Taylor v. State*, 666 So. 2d 36 (Ala. Crim. App. 1994), this Court held that the trial court properly refused to allow Taylor's family and friends to ask the jury to spare his life. In holding that this action by the trial court did not prevent the jury from considering mitigation evidence, this Court stated:

"'[T]he opinion of a relative of a victim is irrelevant to the jury's determination of whether the death penalty should be imposed.' *Robison v. Maynard*, 943 F.2d 1216, 1217 (10th Cir.), *cert. denied*, 502 U.S. 970, 112 S.Ct. 445, 116 L.Ed.2d 463 (1991). *See also Robison v. Maynard*, 829 F.2d 1501, 1504-05 (10th Cir.1987). Such testimony is 'calculated to incite arbitrary response' from the jury. *Robison*, 829 F.2d at 1505.

"Although *Payne v. Tennessee*, 501 U.S. 808, 826-28, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), held that the Eighth Amendment does not prohibit the admission of 'victim impact' evidence at the sentencing phase of a capital trial,

> "'*Payne* merely put aside the bar to the introduction of and comment upon victim impact evidence which had been created in *Booth* [*v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)], *and South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). The Court did not expand the universe of admissible relevant mitigating evidence established by *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). . . . We cannot agree that *Payne* portends admissibility of any evidence other than that related to the victim and the impact of the victim's death on the members of the victim's family. Nothing said by the Court suggests the Court intended to broaden the scope of relevant mitigating evidence to include the opinion of a victim's family

> member that the death penalty should not be invoked. . . .
>
> "' . . . .

"Under Alabama law, nonstatutory mitigating evidence must be relevant.

> "'In addition to the mitigating circumstances specified in section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.'

"Ala. Code 1975, § 13A-5-52. '"[S]ubject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense."' *Clisby v. State*, 456 So. 2d 99, 101 (Ala. Crim. App. 1983) (quoting *Stanley v. Zant*, 697 F.2d 955, 960 (11th Cir. 1983)), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984).

"'Evidence is "relevant" if it logically relates to the ultimate, material inference in the case for which it is proffered.' J. Colquitt, *Alabama Law of Evidence* § 4.1 (1990). '"Evidence is relevant if it has any probative value, however slight, upon a matter at issue in the case.' *Phelps v. State*, 439 So. 2d 727, 736 (Ala. Crim. App. 1983) "Evidence is relevant if it has any tendency to throw light upon the matter in issue, even though such light

may be weak and fall short of demonstration." *Austin v. State*, 434 So. 2d 289, 292 (Ala. Crim. App. 1983).' *Brewer v. State*, 644 So. 2d 39 (Ala.Cr.App. 1994). 'In this State, evidence is relevant if it has any logical relationship to the purpose for which it is offered.' *Rose v. State*, 598 So. 2d 1040, 1042 (Ala.Cr.App. 1992).

"It is the holding of this Court that the opinion of the friends or relatives of the defendant that the defendant should not be sentenced to death is not a relevant mitigating circumstance for the jury to consider at the penalty phase of a capital case. *Compare McGahee v. State*, 632 So. 2d 976, 978 (Ala.Cr.App.), *affirmed*, 632 So. 2d 981 (Ala. 1993) ('The physical effects of electrocution are not an aspect of the appellant's character or record and are not relevant to any of the circumstances of the crime; and we conclude that this type of evidence does not constitute evidence of mitigation.'); *Hinton v. State*, 548 So. 2d 547, 560-61 (Ala.Cr.App. 1988), *affirmed*, 548 So. 2d 562 (Ala. 1989), *cert. denied*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989) ('We interpret this section to limit mitigating evidence to that which assumes that the defendant committed the crime for which he was convicted. . . . This court therefore finds that polygraph results which indicate that the defendant is not guilty of the crime for which he is being sentenced are not relevant to either aggravating or mitigating circumstances and thus are inadmissible in a sentencing proceeding under § 13A-5-45(d).')."

Taylor v. State, 666 So. 2d at 51-53.

Thus, Dotch's brother and father were properly restricted from asking the jury to return a particular

sentence or to spare Dotch's life. *Compare Smith v. State*, [Ms. CR-97-1258, August 31, 2007] __ So. 2d __, __ (Ala. Crim. App. 2000) (opinion on remand from the Supreme Court) ("A capital defendant is not entitled to a mercy instruction in the penalty phase. *See Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005); *Melson v. State*, 775 So. 2d 857 (Ala. Crim. App. 1999).").

There is no constitutional requirement that a capital defendant be allowed to ask a jury for mercy.

> "[W]e view *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2760, 49 L.Ed.2d 913 (1976) to have tacitly held that the availability of such a mercy option to the sentencing authority is not a constitutional requirement. As Mr. Justice White's concurring opinion in *Proffitt* points out, the sentencing authority in Florida is required to impose the death penalty on all first degree murderers as to whom the statutory aggravating circumstances outweigh the mitigating circumstances. *Proffitt* at 260. This required imposition of the death penalty, regardless of mercy, passed constitutional muster in *Proffitt*, and is in keeping with the concern that arbitrary and capricious imposition of the death penalty be avoided. *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982)."

Whisenant v. State, 482 So. 2d 1225, 1236 (Ala. Crim. App. 1982), *affirmed in part, remanded in part on other grounds, Ex parte Whisenant*, 482 So. 2d 1241 (Ala. 1983).

However, despite Dotch's contention that he was prejudiced by the trial court's preventing his family to ask for mercy, the record indicates that his family

did plead for sympathy and the trial court found these pleas to constitute a nonstatutory mitigating circumstance. The trial court found:

> "*Mercy*: The defendant, his attorneys and family plead for mercy. In addition to the letter received from Garrett Dotch, the Court received letters from his family members and a former basketball coach. Those calls for mercy cannot be rebutted by the State. The Court is also mindful of the tragic and irreplaceable loss suffered by the victim's family and friends. However, this non-statutory mitigator was injected by the defense, is found to exist and is given some weight."

(C. 572.)

XIV.

Dotch argues that the trial court abused its discretion in assigning only small weight to the nonstatutory mitigating circumstances of Dotch's poor mental health.

However, because this matter is being raised for the first time on appeal, it is due to be analyzed pursuant to the plain error rule. Rule 45A, Ala.R.App.P.

The trial court acted within its discretion in determining that the nonstatutory circumstance of Dotch's poor mental health was to be afforded only small weight in its weighing process.

> "'[T]he weight to attach to [a] known mitigating circumstance is within the discretion of the trial court. *See Bush v. State*, 695 So. 2d 70 (Ala. Crim. App. 1995), *aff'd* 695 So. 2d 138 (Ala.), *cert.*

denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997).' *Hodges v. State*, 856 So. 2d 875, 893 (Ala. Crim. App. 2001), *aff'd* 856 So.2d 936 (Ala. 2003).

"'The circuit court must consider evidence offered in mitigation, but it is not obliged to find that the evidence constitutes a mitigating circumstance. As the Alabama Supreme Court has stated:

> "'"*See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Ex parte Hart*, 612 So. 2d 536, 542 (Ala. 1992) ('Lockett does not require that all evidence offered as mitigating evidence be found to be mitigating.'), *cert. denied*, 508 U.S. 953, 113 S.Ct. 2450, 124 L.Ed.2d 666 (1993); and *Ex parte Slaton*, 680 So. 2d 909, 924 (1996) ('"While Lockett and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority."') (quoting *Bankhead v. State*, 585 So. 2d 97, 108 (Ala. Crim. App. 1989), *cert. denied* 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997))."

"'*Ex parte Ferguson*, 814 So. 2d 970, 976 (Ala. 2001).'

"*Calhoun v. State*, 932 So. 2d 923, 975 (Ala. Crim. App. 2005), *cert. denied*, 548 U.S. 926, 126 S.Ct. 2984, 165 L.Ed.2d 990 (2006)."

Spencer v. State, [Ms. CR-04-2570, April 4, 2008] __ So. 3d __, __ (Ala. Crim. App. 2008).

Here, the trial court made the following finding concerning this nonstatutory mitigating circumstance:

"Mental Status: The Court has considered the defendant's mental health status in conjunction with the statutory mitigating circumstances of 'extreme mental or emotional disturbance' and 'diminished capacity.' The Court found that the defendant's mental health status does not support a finding of the existence of either of these statutory mitigating circumstances. However, it is undisputed that the defendant has had mental health problems throughout his life, which have occasionally been treated. The Court finds this to be a non-statutory mitigating circumstance and assigns it some weight. However, this weight is small because the defendant has refused both to pursue available mental health treatment and to take medication prescribed to alleviate his condition. According to the observations of those close to him, the medication was capable of stabilizing Dotch's otherwise erratic demeanor. The defendant's justification for avoiding his medication was that it 'slowed him down.'"

(C. 570-71.)

Thus, the trial court found that the nonstatutory mitigating circumstance of a history of mental health problems did exist, but attributed little weight to this factor because Dotch refrained from taking his medicine that could have helped him. Although Dotch argues that a mentally ill individual can not be held accountable for refraining from taking his or her medicine, as the trial court pointed out there was evidence that Dotch was capable of giving the reasoned explanation that the medicine slowed him down. The trial court found that because Dotch chose to feel more alert rather than remain mentally stable,

the trial court could properly find that his illness was not entitled to much weight.

XV.

Dotch alleges that the trial court abused its discretion in assigning insubstantial weight to the nonstatutory mitigating circumstance of a lack of a stable and nurturing environment during childhood. The trial court made the following findings concerning this non-statutory mitigating circumstance:

> "Lack of Stable and Nurturing Environment: The defendant was born out of wedlock while his mother was in a mental facility due to a nervous breakdown. She was in mental health care facilities, including Searcy Hospital, 12 to 14 times with a diagnosis of paranoid schizophrenia during the defendant's childhood. The defendant's mother became addicted to crack cocaine when he was about 8 years old and remained under its influence for many years. The defendant's father spent most of the defendant's youth in the penitentiary and addicted to drugs. When the defendant's father and mother were together, their relationship was marked by physical violence often committed in the presence of the defendant. As a result of the mother's mental illness and drug abuse, the defendant was placed in the custody of the Department of Human Resources at age 8. After several years of foster care, the defendant lived with one or more of the mother's brothers and sisters and for some time lived with a grandmother.
>
> "When the defendant was 14 or 15 years of age, he was confronted by his father in a violent manner while at his grandmother's home. As a

result of this confrontation, the defendant moved into an apartment with his 19 year old brother who thereafter provided the only support and guidance the defendant received. The defendant's father and mother would visit the apartment in order to steal their children's belongings and sell them for drugs. The defendant did not learn that the man involved in these events was his father until he was almost 20 years old. The defendant's mother received a Social Security check for the defendant and would use it to support her drug addiction, although on occasion she would give him some part of the check. The defendant never had a stable wholesome home place or father to provide him supervision and guidance. Any parental influence was provided by foster care or the various siblings of his mother with whom he occasionally and temporarily resided. From age 14 or 15, his only supervision was provided by a brother approximately six years older.

"Accordingly, this Court finds this non-statutory mitigator does exist and gives it some weight. The weight given is not substantial, because many people in our society are exposed to the same troubling conditions but refrain from senselessly murdering innocent victims. The defendant's older brother shared the same parents and suffered many of the same circumstances as the defendant. Yet, he worked, was productive and provided for the welfare of others."

(C. 568-70.)

The trial court found and considered Dotch's difficult upbringing. However, the trial court did not abuse its discretion in according this circumstance

insubstantial weight; there was also evidence including that other members of Dotch's family cared for him during his childhood and adolescence. *See Brown v. State*, 11 So. 2d 866, 931-32 (Ala. Crim. App. 2007) (finding that the trial court properly considered nonstatutory mitigating circumstances where trial court stated that "'in considering the testimony of both family members, even in the light most favorable to the defendant, finds that this is a nonstatutory mitigating circumstance; however, the mitigating circumstance of an unpleasant home life was totally outweighed by the aggravating circumstances as presented [by] the evidence in this case.'"). *See also Vanpelt v. State*, [Ms. CR-06-1539, December 18, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009) (nonstatutory mitigating circumstances of difficult family history and diagnosed antisocial personality, as well as statutory mitigating circumstance of lack of prior criminal activity, was outweighed by aggravating circumstance that murder was committed for pecuniary gain). *Yancey v. State*, [Ms. CR-04-1171, October 9, 2009] So. 3d __, __ (Ala. Crim. App. 2009) (nonstatutory mitigating circumstances of dysfunctional family environment and the jury's recommended sentence of life imprisonment without parole were outweighed by the aggravating circumstances). "Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance. *See Williams v. State*, 710 So. 2d 1276 (Ala. Crim. App. 1996), *aff'd*, 710 So. 2d 1350 (Ala. 1997)." *Newton v. State*, [Ms. CR-05-1517, October 2, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009) (where Newton contended that the trial court improperly failed to reference nonstatutory mitigating circumstances of

his upbringing, his family history, and his accomplice's sentence, this Court noted that trial court's order referenced his difficult upbringing and held that the trial court did not abuse its discretion).

XVI.

Dotch argues that the prosecutor committed misconduct during the sentencing phase and that, in doing so, she violated his right to a fair trial. Specifically, he contends that the prosecutor improperly urged the jury to reject the mitigating factors of extreme mental or emotional disturbance and substantially impaired capacity, as well as improperly referred to prior instances of alleged misconduct. Dotch failed to object to these alleged improprieties at the trial court level; therefore to afford Dotch relief they must rise to the level of plain error. Rule 45A, Ala.R.App.P.

A.

Dotch alleges that the prosecutor improperly encouraged the jury to reject the mitigating factors of extreme mental or emotional disturbance and substantially impaired capacity based on the jury's finding of guilt. He further argues that the prosecutor conflated the two circumstances by stating to the jury, "Let's look at these two because I think you look at these two together." (R. 1565.)

The record indicates that, when making this statement, the prosecutor was commencing her argument to the jury concerning the three alleged statutory mitigating circumstances[18] argued by Dotch and that her entire argument was as follows:

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[18] Dotch also argued that his age at the time of the murder was a statutory mitigating circumstance.

"Let's look at these two because I think you look at these two together. We'll take them separately. The murder was committed while the Defendant was under extreme mental or emotional disturbance. Well, ladies and gentlemen of the jury, in our case-in-chief, I think we went over this throughout the entire trial. Dr. Rosen went over this. Dr. McKeown went over this. And you heard Dr. Rosen get back up on the stand in the sentencing phase and allege the same thing he alleged in the trial. And by your verdict, you have already determined this. You determined that their claim of not guilty by—excuse me, not guilty by reason of mental disease or defect was not valid. You found him guilty of this crime. You found that he was able to appreciate the nature and wrongfulness of his acts at the time that he committed this murder.

"So, I submit to you, ladies and gentlemen of the jury, this is not a mitigating circumstance. At the time that he committed this murder, he was not under extreme mental or emotional disturbance. He knew what he was doing. You found that when you found him guilty of capital murder. At the time that he committed this murder, he had the capacity to appreciate the criminality of his conduct. You found that when you found him guilty of capital murder.

"I submit to you, ladies and gentlemen of the jury, this mitigating circumstance does not exist."

(R. 1565-66.)

It is clear that the same evidence that is introduced for evaluating whether a defendant's sanity was in question at the time of the offense so as to satisfy the

affirmative defense of mental disease or defect may also be looked to for a determination of whether the mitigating circumstances of both substantially impaired and under the influence of mental or emotional infirmity exist. *See Ex parte Davis*, 554 So. 2d 1111 (Ala. 1989), *rehearing overruled*, 569 So. 2d 738 (Ala. 1990), *cert. denied*, 498 U.S. 1127 (1991) (where Davis sought a psychological examination to prove the same two mitigating circumstances, the Alabama Supreme Court held that there was no evidence, including the pretrial mental examinations, indicating that Davis "was under the influence of a mental or emotional infirmity at the time he committed the capital felony that would be relevant to the mitigating circumstances in [Ala.] Code 1975, §§ 13-11-7(2) and (6)" or "that might have [cast] some doubt on [Davis's] sanity at the time he committed the capital felony." 554 So. 2d at 1118. The court found "no evidence that [Davis's] mental condition was seriously in question, either at the guilt phase of the trial or at the sentencing phase of the trial." *Id.*).

Moreover, the record further indicates that the trial court informed the jury of all the statutory mitigating circumstances, as well as the three mitigating circumstances being argued by Dotch. The court also fully charged the jury as to the burden of proof of the mitigating circumstances, as well as the State's burden of proof to disprove them if their existence is in dispute.[19] (R. 1611-21.) The jury was also instructed as to its duty in considering and weighing these circumstances. (R. 1612-15.)

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[19] The jury was not improperly informed that the standard of proof for these mitigating circumstances was as high as that for the affirmative defense of mental disease or defect. *Ivery v. State*, 686 So. 2d 495, 503 (Ala. Crim. App. 1996).

There is no indication in the record that the jury was confused by the prosecutor's comments as to the consideration of the two mitigating circumstances. Nor was there confusion caused by her comments concerning the evidence, including the jury's decision, from the guilt phase. *See* Part XII, *supra*. *See also Ferguson v. State*, 814 So. 2d 925, 962 (Ala. Crim. App. 2000) ("Contrary to Ferguson's contention, merely because the trial court used the word 'insane' in its sentencing order and found that Ferguson knew right from wrong does not mean that the court applied the standard of legal insanity to Ferguson's proffered mitigating evidence. After reviewing the record and the trial court's sentencing order, we conclude that the trial court did not require Ferguson to prove that he was legally insane in order to show that he was under the influence of an extreme mental or emotional disturbance, that his ability to appreciate the criminality of his conduct was substantially impaired, or that he was under extreme duress or the substantial domination of another person.").

B.

Dotch argues that the prosecutor improperly mentioned instances of his alleged prior misconduct. He cites her references to fights he got involved in as a youth, a disparaging remark he made about a teacher, his selling drugs as a teenager, and his choking a housekeeper at a mental-health facility.

The record indicates that the prosecutor argued to the jury that the evidence presented during the guilt phase through records from Dotch's school and from mental-health facilities which he was housed[20]

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[20] It should be noted that these records were introduced by Dotch at the guilt phase.

refuted his arguments of the existence of the mitigating circumstances of a bleak upbringing and mental illness. The prosecutor referred to mental-health-facility records that characterized Dotch as a manipulator and school records that referred to his fighting, his being suspended for fighting, and his calling his physical-education teacher a "bitch." (R. 1584.) Defense counsel objected to these comments, and the prosecutor responded that the evidence was relevant to contradict the argued mitigating evidence. The trial judge overruled the objection and stated that he would inform the jury as to how it should consider this evidence.

The prosecutor then referred to Dotch's drug usage and his suspension from school for having been caught with marijuana in a stolen vehicle. She argued to the jury that Dotch stated in his medical reports at Searcy Medical Facility that he had never taken responsibility for his illegal activities and drug usage and further that he was noncompliant with his medicines. (R. 1585.) She argued that the defense's argument in mitigation that Dotch and his brother were desolate was negated by Dotch's self-reported job history; specifically, that he sold drugs, and that he was fired from several short-term jobs for failing to follow rules, yet she noted that he was able to play organized sports in high school. (R. 1586-87.) The prosecutor stated, "And all of this goes to show that the circumstances weren't quite what they tried to make them seem in the mitigating evidence, ladies and gentlemen." (R. 1587.)

Thereafter, the prosecutor began to comment on an instance wherein Dotch attempted to strangle a housekeeper at Searcy Medical Facility. Defense counsel objected that the prosecutor was improperly

arguing another unauthorized aggravating factor. (R. 1587-88.) The trial court noted that the prosecutor could present evidence to negate a mitigating circumstance; however, the trial court stated that it did not view this evidence as going to that purpose. The trial court therefore instructed the jury to disregard "the beginning" of the prosecutor's argument "in which she related some prior misconduct." (R. 1588.)

Defense counsel moved for a mistrial based on the prosecutor's comments as to the criminal conduct because she says, they were not relevant and were unduly prejudicial. The prosecutor responded that the evidence went to refute the mitigating factor concerning his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The trial court, however, stated, "I've already ruled that I'm not going to let you go into these prior acts in this summation, go into these prior acts that you've pulled out of the records that otherwise haven't been made part of the case-in-chief as part of a closing argument . . . for the first time in the sentencing hearing, and so I'm going to sustain the objection to that." (R. 1590-91.) The trial court then stated that it was sustaining Dotch's objection to any argument concerning the choking incident because any probative value would be outweighed by its prejudicial effect.

As to the motion for a mistrial, the prosecutor argued that because the jury had already determined guilt in the first phase of trial, Dotch would not be entitled to a new trial. The judge determined that his curative instructions to the jury to disregard the comments were sufficient to cure any error. (R. 1592.)

Here, the trial court sustained Dotch's objection to the argument concerning the choking of the housekeeper, instructed the prosecutor that it would not allow reference to the prior acts, and instructed the jury to disregard the prosecutor's argument "in which she related some prior misconduct." (R. 1588.) This action by the trial judge was sufficient to cure any error as to the prosecutor's comments.

> "A declaration of a mistrial indicates a miscarriage of justice and is granted only where it is clearly manifest that justice cannot be insured. *Chesson v. State*, 435 So. 2d 177, 181 (Ala.Cr. App. 1983); *Long v. State*, 370 So. 2d 354 (Ala.Cr.App. 1979).
>
> "Where the trial court immediately instructs the jury not to consider a fact, that instruction, in effect, removes or excludes that matter from the jury's consideration, and the prejudicial effect of the statement is deemed to be cured by such instruction. *Bradley v. State*, 450 So. 2d 173, 176 (Ala.Cr.App. 1983); *Richardson v. State*, 374 So. 2d 433 (Ala.Cr.App. 1979). The trial judge's immediate charge to the jury to disregard an impropriety raises a prima facie presumption against error. *Kelley v. State*, 405 So. 2d 728 (Ala.Cr.App.), *cert. denied*, 405 So. 2d 731 (Ala. 1981).
>
> "'The entry of a mistrial is not lightly to be undertaken. It should be only a last resort, as in cases of otherwise ineradicable prejudice. Where error is eradicable a mistrial is too drastic and is properly denied.' *Woods v. State*, 460 So. 2d 291, 296 (Ala.Cr.App. 1984); *Chillous v. State*, 405 So. 2d 58 (Ala.Cr.App. 1981).

> "When prejudicial remarks have been made, the trial judge is in a better position than the appellate court to determine whether the remarks were so prejudicial as to be ineradicable.' *Chambers v. State*, 382 So. 2d 632, 635 (Ala.Cr.App.), *cert. denied*, 382 So.2d 636 (Ala. 1980)."

Soriano v. State, 527 So. 2d 1367, 1371 (Ala. Crim. App. 1988).

Moreover, the record reveals that during the cross-examination of Dotch's brother at the penalty phase, he testified that he knew that Dotch "might have smoked some weed from time to time." (R. 1554.) Furthermore, the trial court also acknowledged that "both sides will rely on all the evidence that was accepted during the guilt phase of the trial." (R. 1556.) Thus, evidence concerning Dotch's bad acts, including his drug usage, were properly before the jury at the penalty phase. *Cf. Smith v. State*, [Ms. CR-97-1258, August 31, 20071 __ So. 2d __ (Ala. Crim. App. 2007) (opinion on remand from the Alabama Supreme Court) (State's reference to prior crimes by Smith during its opening argument that were not all proven at the penalty phase was harmless error because there was evidence admitted at sentencing concerning his extensive criminal history and the trial court instructed the jury that arguments of counsel were not evidence and that only the two aggravating circumstances presented could be considered by the jury.).

> "Statements of counsel in argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict. *Hayes v. State*, 395 So. 2d 127 (Ala. Crim. App. 1980), *cert.*

denied, 395 So. 2d 150 (Ala. 1981); *McQueen v. State*, 355 So. 2d 407 (Ala. Crim. App. 1978); *Pickett v. State*, 417 So. 2d 589 (Ala. Crim. App. 1982)." *Orr v. State*, 462 So. 2d 1013, 1016 (Ala. Crim. App. 1984). The trial court instructed the jury that the attorneys' arguments and comments were not to be viewed as evidence and cured any error in the prosecutor's reference to prior bad acts by Dotch.

XVII.

Dotch argues that his sentence of death is due to be reversed pursuant to the holding in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). He alleges that Alabama's capital-sentencing scheme is functionally identical to the scheme held to be unconstitutional in *Ring*, because the jury's verdict is not binding on the court. He further argues that Alabama's capital-sentencing scheme violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by violating the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt.

In *Apprendi*, the United States Supreme Court held that a fact that increased a defendant's sentence beyond the statutory limits, other than the fact of a prior conviction, had to be found by a jury beyond a reasonable doubt. The Court then applied this holding to cases involving the death penalty in *Ring*, *supra*.

However, courts in Alabama have determined that Alabama's sentencing scheme is not unconstitutional under *Ring*, or *Apprendi* because the weighing process undertaken to arrive at a capital sentence is not a finding of fact or an element of the offense;

therefore, a jury is not constitutionally required to weigh the aggravating and mitigating circumstances. *See Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002); *Beckworth v. State*, 946 So. 2d 490, 515 (Ala. Crim. App. 2005), *cert. denied*, 549 U.S. 1120 (2007). Therefore this issue has already been determined adversely to Dotch's arguments.

XVIII.

Dotch contends that "evolving standards of decency have rendered Alabama's method of execution unconstitutional." (Dotch's brief, at 116.) Dotch argues that Alabama's procedures for administering a lethal injection pose a substantial risk of inflicting unnecessary pain and thus violate the Eighth and Fourteenth Amendments to the United States Constitution. He also submits that these procedures violate the provision of the Alabama Constitution 1901, Art. I, § 15, prohibiting cruel and unusual punishment.

The appellate courts of this State have repeatedly held this issue to be meritless.

> "This issue has been addressed by recent opinions from this Court. In *Saunders v. State*, 10 So. 3d 53 (Ala. Crim. App. 2007), this Court stated:
>
> > "'The United States Supreme Court has held that the imposition of the death penalty as a sentence for capital murder is not per se unconstitutional. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In addition, Alabama's capital-murder statute has been upheld against a variety of constitutional challenges. *See, e.g., Clark v. State*, 896 So. 2d 584 (Ala. Crim. App. 2000),

> and cases cited therein. This Court has also held that lethal injection does not constitute per se cruel and unusual punishment. *See, e.g., McNabb v. State*, 991 So. 2d 313 (Ala. Crim. App. 2007), and cases cited therein. Therefore, Saunders's general claim that the death penalty constitutes cruel and unusual punishment is merit less.'"

Jackson v. State, [Ms. CR-06-1398, December 18, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009). *See also Vanpelt v. State*, [Ms. CR-06-1539, December 18, 2009] __ So. 3d __, __ (Ala. Crim. App. 2009) (Vanpelt's argument that "evolving standards of decency have rendered Alabama's method of execution . . . unconstitutional" held to have been rejected by the United States Supreme Court, the Alabama Supreme Court, and this Court).

XIX.

Dotch argues that the death penalty is especially cruel and unusual punishment when applied to a person who suffers from "long-lasting mental health problems" like himself. (Dotch's brief, at 118.)

Under constitutional guidelines, in order to be exempt from the imposition of the death penalty, a defendant must meet the definition of mentally retarded, *see Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002); *Atkins v. Virginia*, 536 U.S. 304 (2002), or the definition of legal insanity. § 15-16-24, Ala. Code 1975. Moreover, Alabama's system of weighing the aggravating circumstances and the mitigating circumstances in order to determine whether life imprisonment without parole or death is the appropriate sentence in a case has been held not to be unconstitutional; thus, if the mitigating evidence concerning a

defendant's mental health is determined to outweigh the aggravating evidence, the defendant could not be sentenced to death. § 13A-5-46(e); § 13A-5-48.

In the present case, the jury determined at the guilt phase, that Dotch was not legally insane. Thereafter, when determining sentencing, the jury considered evidence concerning the mitigating circumstances that Dotch was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. § 13A-5-51(2) and (6), Ala. Code 1975. The jury also considered evidence of the nonstatutory mitigating circumstance concerning Dotch's mental health and history. The jury determined that this evidence was outweighed by the aggravating circumstances. The trial court, in sentencing Dotch, accorded small weight to the nonstatutory mitigating circumstance concerning his mental status and found that the statutory mitigating circumstances in § 13A-5-51(2) and (6), Ala. Code 1975, did not exist and accorded them no weight.

Thus, Dotch was properly sentenced to death, and this Court will not extend or expand the constitutional prohibitions against the application of the death penalty in this case. *See Gavin v. State*, 891 So. 2d 935-38 (Ala.Crim. App. 2003), *cert. denied*, 891 So. 2d 998 (Ala. 2004), *cert. denied*, 543 U.S. 1123 (2005) (Gavin's claim of cruel and unusual punishment based on a challenge that did not factually apply to his case should not be reached as ""the question of a statute's validity can not be determined abstractly, but rather should be determined only as it applies and is to be enforced in the specific case before the court."" 891 So. 2d at 937 (quoting other cases)).

XX.

Pursuant to § 13A-5-35, Ala. Code 1975, we are required to address the propriety of Dotch's conviction and sentence of death. Dotch was indicted and convicted of capital murder because he killed Timarla Taldon by use of a deadly weapon while she was in a vehicle. *See* § 13A-5-40 (17), Ala.Code 1975.

According to Rule 45A, Ala.R.App.P., we have searched the entire proceedings for any plain error and have found none. Further, pursuant to § 13A-5-53, Ala. Code 1975, we are required to address the propriety of Dotch's sentence of death. It is the finding of this court that there is no error in the sentencing that adversely affected Dotch's rights.

The record does not reflect that the sentence of death was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. *See* § 13A-5-53(b) (1), Ala. Code 1975.

The trial court found the existence of two aggravating circumstances: that the offense was committed by Dotch when he was under sentence of imprisonment and that Dotch had previously been convicted of a felony involving the use or threat of violence to the person. § 13A-5-49(1) and (2), Ala. Code 1975. The trial court further found the existence of no statutory mitigating circumstances. As to the nonstatutory mitigating circumstances, the trial court found the existence of the following circumstances and accorded each "some weight": Dotch's lack of a stable and nurturing environment during childhood, Dotch's long-term abuse of illegal drugs, Dotch's mental-health problems, Dotch's capacity to love and care for others, and Dotch's, his family members', and his attorneys' pleas for mercy. (C. 568-72.) The trial court

further indicated in its sentencing order that it considered the jury's recommended sentence of death by a vote of 10 in favor of death to 2 in favor of life imprisonment without parole and gave it due weight under the law.

In weighing the aggravating circumstances against the mitigating circumstances, the trial court determined:

> "Timarla Taldon was a young woman loved by her family, and she did not deserve her fate. She supported herself while continuing her education. Garrett Dotch tormented her and would not let her live in peace. He twice pleaded guilty to committing crimes against her, yet he continued to harass and threaten her. Garrett Dotch, acting with unexplainable malice, violently ended Timarla Taldon's promising young life."

(C. 574-75.)

The trial court determined that the aggravating circumstances outweighed the mitigating circumstances. The trial court's findings concerning the existence and weighing of these circumstances are supported by the record.

It is the finding of this Court that death is the proper sentence in this case. Section 13A-5-53(b) (2), Ala. Code 1975, requires this court to weigh the aggravating circumstances and the mitigating circumstances independently to determine the propriety of Dotch's sentence of death. An independent weighing of the aggravating and mitigating circumstances indicates that the trial court's determination was proper and that death is the proper sentence.

As required by § 13A-5-53(b) (3), Ala. Code 1975, this Court must determine whether Dotch's sentence was disproportionate or excessive when compared to the sentences imposed in similar cases. The penalty in this case is neither disproportionate or excessive when compared to the penalties imposed in similar cases, considering the circumstances surrounding both the crime and Dotch. *See, e.g., Key v. State*, 891 So. 2d 353 (Ala. Crim. App. 2002); *Knight v. State*, 907 So. 2d 470 (Ala. Crim. App. 2004).

After carefully reviewing the record of both the guilt phase and the sentencing phase of Dotch's trial, and for the reasons expressed here, we affirm Dotch's conviction and sentence.

AFFIRMED.

Welch, Windom, and Kellum, JJ., concur. Wise, P.J., concurs in the result.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

[Logo]

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CR-07-1913
Death Penalty

GARRETT DOTCH

v.

STATE OF ALABAMA
(Appeal from Mobile Circuit Court: CC07-788)

June 11, 2010

NOTICE

You are hereby notified that on June 11, 2010 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ Lane W. Mann
Lane W. Mann, Clerk
Court of Criminal Appeals

cc: Hon. Roderick P. Stout, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
Brent F. Powell, Attorney - Pro Hac
Angela Setzer, Attorney
Randall S. Susskind, Attorney
Seth A. Tucker, Attorney - Pro Hac
Joseph Zambuto, Jr, Attorney - Pro Hac
Joshua Bearden, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

[Logo]

Ex parte Garrett Dotch.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Garrett Dotch v. State of Alabama)

(Mobile Circuit Court: CC07-788; Criminal Appeals : CR-07-1913).

January 14, 2011

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on January 14, 2011:

Writ Denied. No Opinion. Cobb, C.J. - Lyons, Woodall, Stuart, Bolin, Parker, Murdock, and Shaw, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the fore-

going is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 14th day of January, 2011.

/s/ [Illegible]
Clerk, Supreme Court of Alabama

APPENDIX D

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT THE ALABAMA COURT OF CRIMINAL APPEALS

CR-07-1913

GARRETT DOTCH

v.

STATE OF ALABAMA
(Appeal from Mobile Circuit Court: CC07-788)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on April 2nd 2010:

Affirmed.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness. Lane W. Mann, Clerk
Court of Criminal Appeals, on this
the 14th day of January, 2011.

/s/ [Illegible]
Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon . Roderick P. Stout, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
Brent F. Powell, Attorney - Pro Hac
Angela Setzer, Attorney
Randall S. Susskind, Attorney
Seth A. Tucker, Attorney - Pro Hac
Joseph Zambuto, Jr, Attorney - Pro Hac
Joshua Bearden, Asst. Attorney General

APPENDIX E

State of Alabama v. Garrett Dotch
Case No. CC-2007-0788

Trial Transcript Excerpt - Sentencing Phase
Trial Court's Oral Charge to Jury,
Jury Question, and Verdict
(May 14, 2008)

Ladies and gentlemen, I will read to you some instructions that will relate to and control your deliberations upon the appropriate sentence to be [1605] rendered in this case. I will make a conscious effort to read fairly slowly so that you'll have a better opportunity to absorb it.

In charging you at this point, I want to remind you of the instructions I gave you yesterday concerning the basic law in defining the terms reasonable doubt as well as your duties and functions as jurors. If any of you feel it necessary, on your request, I will re-charge you as to each and every aspect of those principles of law that we've covered, I think, it was yesterday.

I will not now charge you as to the principles of law of the capital offense charged in the indictment because that question was settled yesterday by your verdict when you found the Defendant guilty of a capital offense. Now, because I am giving instructions to you at this point does not mean you are to assume as true any question of fact that I may refer to in these instructions. Instead, it is left solely to you to determine what the facts are and what you think the sentence should be in this case.

The law of Alabama provides that the punishment for the capital offense for which you have convicted the Defendant is either death or [1606] life imprisonment without the possibility of parole. Life imprisonment without parole means life imprisonment without parole. It is the law of this State that a defendant sentenced to life imprisonment without parole will never be paroled.

Under our law, in determining whether the Defendant should be sentenced to death or to life imprisonment without parole depends on several factors. First, you must determine whether any aggravating circumstance exists and, if so, whether the aggravating circumstance or circumstances outweigh any mitigating circumstances.

An aggravating circumstance is a circumstance provided by law which indicates or tends to indicate that the Defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the Defendant should be sentenced to life imprisonment without parole instead of death. Your role in this sentencing hearing is to consider any aggravating circumstances and any mitigating circumstances that are presented to you and to weigh them against each other to determine what the proper punishment should be in this case.

In determining what the punishment should be [1607] in this case, you should consider the evidence presented at this sentencing hearing and you should also consider any evidence that was presented during the guilt phase of the trial that is relevant to the existence of any aggravating or mitigating circumstances.

The first thing you must determine is whether any aggravating circumstance exists. The law provides a list of aggravating circumstances which you may consider, and you must be convinced beyond a reasonable doubt from the evidence that one or more of these aggravating circumstances exists. If you are not convinced beyond a reasonable doubt that an aggravating circumstance exists, then you must find that the Defendant's punishment is life imprisonment without parole regardless of whether there are any mitigating circumstances in the case.

If you are convinced beyond a reasonable doubt that an aggravating circumstance or one or more exists, then you shall consider the mitigating circumstances and weigh them against the aggravating circumstances to determine what the proper punishment is in this case.

Of the list of aggravating circumstances provided by law, there are two that you may [1608] consider in this case. First, the capital offense was committed by a person under sentence of imprisonment. And I charge you that a person who is on probation on a felony charge is, by law, considered to be under sentence of imprisonment.

The second aggravating circumstance for your consideration is the Defendant had been previously convicted of a felony involving the use or threat of use of violence to a person. Now, the fact that I instruct you on an aggravating circumstance or as I've just now defined it for you does not mean that the aggravating circumstance has been proven beyond a reasonable doubt. Whether the aggravating circumstance or circumstances which we are discussing has been proven beyond a reasonable doubt is for you, the jury, alone to determine.

As I have told you, the burden is on the State to convince each of you beyond a reasonable doubt that an aggravating circumstance relied upon in this case exists. This means that before you can even consider finding the Defendant's punishment to be death, each and everyone of you must be convinced beyond a reasonable doubt based on all the evidence that at least one of these aggravating circumstances exists.

[1609] In determining whether the State has proven the existence of an aggravating circumstance beyond a reasonable doubt, you should keep in mind the definition I have previously given you as to reasonable doubt. And again, if you wish to be refreshed or reminded on that, ask me, and I'll be glad to do so.

The evidence upon which a reasonable doubt about an aggravating circumstance may be based is both the evidence you heard in the guilt phase of this trial and the evidence you have heard in the sentencing hearing. A reasonable doubt may arise from all the evidence, from any part of the evidence, or from a lack or failure of the evidence. The burden does not—excuse me, the Defendant does not have to disprove anything about an aggravating circumstance. Rather, the burden is entirely on the State to prove the aggravating circumstance beyond a reasonable doubt.

In this case, there are two aggravating circumstances for your consideration. First, whether Garrett Dotch was under a sentence of imprisonment when the capital offense was committed; and second, whether Garrett Dotch had been previously convicted of a felony involving the [1610] use or threat of violence against another person.

If all 12 of you are not convinced that an aggravating circumstance has been proven beyond a reasonable doubt, then your deliberations are over and you must return a verdict setting the Defendant's punishment at life imprisonment without parole. However, if all 12 of you are convinced that one or both aggravating circumstances have been proven beyond a reasonable doubt, then you must proceed with your deliberations and consider whether any mitigating circumstances exist.

As I have mentioned, a mitigating circumstance is any circumstance that indicates or tends to indicate that the Defendant should be sentenced to life imprisonment without parole instead of death.

The law of our State provides a list of some of the mitigating circumstances that you shall consider, but that list is not a complete list of the mitigating circumstances that you may consider. The stated list of mitigating circumstances that apply in this case are, one, the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance; second, the capacity of the Defendant [1611] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and third, the age of the Defendant at the time of the crime.

Keep in mind that a mitigating—excuse me, keep in mind that a mitigating circumstance that you may consider does not have to be included on the list I have just read to you in order for it to be considered by you. In addition to the mitigating circumstances I have read to you, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense

that the Defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

A mitigating circumstance considered by you should be based on the evidence you have heard. However, a mitigating circumstance does not have to be proven beyond a reasonable doubt like an aggravating circumstance. When the factual existence of an offered mitigating circumstance is in dispute, the State shall have the burden of disproving the factual existence of a circumstance by a preponderance of the evidence. The burden of disproving a circumstance by a preponderance of the [1612] evidence means that you are to consider that the mitigating circumstance does exist unless, from the evidence—taking the evidence as a whole, it is more likely than not the mitigating circumstance does not exist. Therefore, if there is a factual dispute on the existence of a mitigating circumstance, then you should find and consider the circumstance to exist unless you find the evidence is such that it is more likely than not that the mitigating circumstance does not exist.

When I instructed you regarding aggravating circumstances, I told you that all 12 of you must unanimously agree upon the existence of an aggravating circumstance before you can consider that aggravating circumstance has been proven. However, that is not the case with mitigating circumstances. It is not necessary for there to be a unanimous agreement on the existence of a mitigating circumstance in order for you to consider it in setting punishment.

If you, as an individual juror, find, under the law as I have given it to you, that a mitigating circumstance exists, then you individually may consider that circumstance and weigh it against any aggravating circumstances [1613] regardless of

whether any other juror agrees with you about the existence of that mitigating circumstance. Again, although there must be a unanimous agreement upon the existence of an aggravating circumstance, there does not have to be a unanimous agreement upon the existence of a mitigating circumstance.

Once you, as a jury, have unanimously agreed upon the existence of an aggravating circumstance, each juror must weigh that aggravating circumstance against the mitigating circumstances that each juror individually has determined to exist in order to determine what the Defendant's punishment shall be in this case.

I charge you further that in weighing any aggravating factor or factors against any mitigating factor or factors, it is necessary that you weigh any such mitigating factor or factors against the same aggravating factor or factors to arrive at your verdict.

The process of weighing aggravating and mitigating circumstances is not a mechanical one. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing [1614] that number to the total number of mitigating circumstances. If the jury determines that no aggravating circumstance exists, it shall return a verdict of life imprisonment without parole. If the jury determines that one or more aggravating circumstance exists, but do not outweigh the mitigating circumstances, it shall return a verdict of life imprisonment without parole. If the jury determines that one or more aggravating circumstance exists and that they outweigh the mitigating circumstances, the jury shall return a verdict of death.

The law of our State recognizes it is possible in at least some situations that one or more aggravating circumstances might outweigh a large number of mitigating circumstances. The law also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence [1615] in light of all other circumstances in the case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

You must avoid any influence of passion, prejudice, or other arbitrary factors. Your deliberation and verdict must be based upon the evidence you have seen and heard and the law which I have instructed you on. There is no room for passion, prejudice or any other arbitrary factors.

Once you have considered all the evidence—Excuse me. Once you have considered all the evidence and you have determined the existence of an aggravating—of any aggravating and mitigating circumstances, you should vote to determine what the Defendant's punishment should be in this case. Before you vote, you should hear and consider the views of your fellow jurors and you should bring to bear your best judgment on the sole issue which is before you whether the Defendant should be sentenced to life imprisonment without parole or to death.

In order to reach a verdict concerning the Defendant's sentence in this case, your decision does not have to be unanimous. In order to bring [1616] back a verdict setting the punishment as death, at least ten of you must vote for the death sentence. In other words, a verdict for death must either be unanimous or 11 for death and one for life without parole or ten for death and two for life without parole. Any number voting for death less than ten cannot be used to set the punishment at death.

In order to return a verdict setting punishment at life imprisonment without parole, there must be concurrence or agreement of at least seven of you for this punishment. In other words, in order for you to return a verdict of life imprisonment without parole, any number less than seven cannot set punishment at life without parole. In addition to setting sentence at either death or life imprisonment without parole, your verdict form must contain the numerical vote, not who voted, but the count.

Now, ladies and gentlemen, after a fair—full and fair consideration of all the evidence, if you are convinced beyond a reasonable doubt that either or both of the aggravating circumstances I've charged you on does exist and at least ten of you agree that the aggravating circumstance or circumstances outweigh the mitigating circumstance [1617] or circumstances, then your verdict would be death and your foreperson would sign the corresponding line. He or she would indicate the vote at blank, fill in the number for death and fill in the number for life without parole.

However, if after fair and full consideration of the evidence, you are not convinced beyond a reasonable doubt that any aggravating circumstance exists or at

least seven of you agree that the mitigating circumstances outweigh the aggravating circumstances, your verdict would be life without parole and your foreperson would sign the corresponding line. The foreperson would then indicate the vote as blank for death and blank for life without parole.

And I have prepared and reviewed with the attorneys a verdict form, which, basically, I'm kind of repeating. It says we, the jury, determine the Defendant, Garrett Dotch, be sentenced to death. The vote is as follows, the number for death, the number for life without parole, the foreperson signing it. Or we, the jury, determine the Defendant, Garrett Dotch, be punished by life imprisonment without parole. The vote is as follows, so many for death, so many for life [1618] without parole and then the foreperson sign it.

That concludes my instructions to you on this sentencing phase of the trial. If the ladies and gentlemen of the jury would please retire to the jury room. But, again, I ask you please do not consider—commence your deliberations until I've had an opportunity to hear from the attorneys to see if I have misspoken or forgotten to tell you something. I want to make sure I give you a complete and accurate charge before you commence your deliberations. If I do not need to bring you back for further instruction, I or Beth, someone will knock on the door and hand you the verdict form and that will be your signal to start your deliberations. Thank you.

(Jury not present, 2:02 p.m.)

THE COURT: Ms. Rich, any exceptions from the State?

MS. RICH: No, sir.

THE COURT: Mr. Hughes?

MR. HUGHES: Your Honor, if it please the Court, in reviewing the sample that you gave us yesterday, I was thinking it was in this one, there is a provision in the sample that we had yesterday where the instructions said that if you find the [1619] mitigating circumstances are equally balanced with the aggravating circumstances, you, the jury, must return a verdict of life imprisonment without parole. The charge you just gave does not contain that paragraph.

THE COURT: Well, it—it, obviously, does say that before there can be a sentence of death, the aggravating circumstances have to outweigh the—If something has—well, you're saying if it's 50/50.

MR. HUGHES: Yes, sir.

THE COURT: Then, obviously, if something is 50/50, it doesn't outweigh. It's an equal weight. I think it may be saying the same thing. I have no objection to doing that.

MS. RICH: I object at this point. You've already said it has to outweigh, so that's the same thing.

THE COURT: That's sufficient. Let's note your exception. And I did give your requested charge, so I assume you don't except to the way I read that?

MR. HUGHES: That was excellent. Judge, on this—I would except to the Court's failure to charge in the language—and if I might, again, [1620] read it for the record?

THE COURT: Sure.

MR. HUGHES:—if you find that the mitigating circumstances are equally balanced with the aggra-

vating circumstances, you, the jury, must return a verdict of life imprisonment without parole. And we except to the Court's failure to charge that.

THE COURT: I note your exception. For what it's worth, I feel that's, basically, saying the same thing twice and is not necessary.

Anything further from the State or the Defendant?

MR. HUGHES: No, sir.

THE COURT: All right. Why don't y'all, just because I'm paranoid, one more time look at the verdict farm as amended and make sure y'all agree it's the proper verdict form.

MS. RICH: Judge, did you look at other verdict forms from other cases?

THE COURT: I got that out of the AG stuff you gave me yesterday, which doesn't make it right, but—

MS. RICH: You did? Okay.

THE COURT: I haven't looked at any others, [1621] no. Did you think there might be reason to do so?

MS. RICH: I don't know—I'm just—No.

THE COURT: I think it's pretty straightforward.

MS. RICH: Okay. That's fine.

THE COURT: Okay. I'm going to have Beth knock on the door, hand them the form and tell them to commence their deliberations.

THE CLERK: They get all the evidence too?

THE COURT: Yeah, I think the State and the Defendant would agree that they get all the evidence that was admitted during the case in chief.

MS. RICH: (Nods head affirmatively).

THE COURT: You can take that in to them.

(The jury began deliberations at 2:06 p.m. this date.)

(4:20 p.m.)

(Defendant present with Counsel, and Assistant District Attorneys Ashley Rich and Jennifer Wright.)

(Jury not present.)

MR. HUGHES: Your Honor, if I might, something that occurs to me, that portion of the charge, the previous one—previous one you gave [1622] where I said—where it had language in there that if it's equal division—Let me find it.

MR. HALE: Balance.

THE COURT: Yeah, you said if they were equally divided, then they must vote for life without.

MR. HUGHES: Right.

THE COURT: If they're equally divided six to six and if I tell them they've got—that's at least seven—

MR. HUGHES: I mean, I don't know. I understand what they're doing there. I thought that might be something that might help them move forward from where they were. Whatever Your Honor says.

THE COURT: Bring them in.

(4:21 p.m.)

(Jury present.)

THE COURT: Everyone have a seat, please. I received the question, and, if I may, I'll answer both parts of it. But let me ask—answer the second part first. The second part, as I read the handwriting—and y'all speak up and correct me if I'm not reading it correctly—it says: Is it possible to have you go back

over the count it [1623] takes to determine life or death?

For the jury to return a verdict of life in prison without parole, it requires at least seven votes for life without parole. For the jury to return a verdict of death, it takes ten or more for death. It takes seven votes to return a verdict or a determination of life without parole. It takes ten or more of you have to vote for the death penalty to return a determination of death.

This first part of the question says: If we don't have the numbers to make a decision, what do we do? My response to that is that you relax, take a breath and keep working. It's necessary, important, what I charged you on earlier today is that you calmly listen to everyone else's point of view without giving up your point of view, but listen to everyone and then continue to work toward making the decision that is necessary in this case.

I would imagine everybody involved in this, including yourselves, are feeling some degree of fatigue at this point in time. Obviously, the State, its lawyers, the Defense, its lawyers and everyone involved has invested a lot of time and emotional energy into the presentation of this case, and it's necessary that you have heard it [1624] all. I kind of lost track of the number of witnesses, but probably 27 or more witnesses have testified, and I'm going to ask you to go back to the jury room and continue your deliberations.

If you have additional questions on the legal matters that I can answer, you certainly can ask those questions. I don't think—I don't know that y'all have had a break. If you want to take a break out of

the jury room, that's fine. Get a breath of fresh air. What I ask you to do, of course, is not discuss the case with anybody, even with each other unless all of you are together in the room. So, if you take a break, let me know that you're leaving and then the foreperson can call me and tell me that all 12 of you are back and you're resuming your deliberations.

It is 4:20 in the afternoon. By my recollection, you started your deliberations on this phase at 2:00 o'clock, and I would like to have you take a break if you want to. Or if you don't want to, that's also fine, but to continue to deliberate this afternoon for at least sometime later. Some of you may have family commitments, picking up kids at school or things of that nature and we'll be mindful of that, but I would encourage [1625] you to continue to work this afternoon to see if you can achieve the counts as I have stated it requires, and, again, that is at least five have to vote for life sentence without parole, at least ten have to vote to return a death sentence.

MS. RICH: Judge, you said five.

THE COURT: I'm getting fatigued too. I'm sorry. Thank you. That was totally misspoken. Seven or more, seven or more, at least seven have to return a vote of life without to return that, at least seven. And ten or more have to vote for death for it to be a death sentence. Did I say it right that time?

MS. RICH: (Nods head affirmatively).

THE COURT: Thank you. Let me know what you want to do about a break, if you wish to have one.

(Court's Exhibit Number 6 was marked for identification.)

THE CLERK: They're going to take a break.

THE COURT: Just call me when you come back. When all of you are back, call me and tell me all 12 of you are back in the room and I'll know you've started. Thank you. For the record, one of the jurors said they're going to take a break.

Ms. Rich, any—

[[1626] MS. RICH: No.

THE COURT: Mr. Hughes, any—

MR. HUGHES: None.

MS. RICH: I'm sorry, Judge.

THE COURT: Any exceptions?

MS. RICH: No, sir.

(Recess 4:27 p.m.)

(The jury resumed deliberations at 4:50 p.m. this date).

VERDICT

(5:38 p.m.)

(Counsel for the Defendant present, and Assistant District Attorneys Ashley Rich and Jennifer Wright.)

THE COURT: All right. The jury called just a moment ago and told my judicial assistant that they had made a determination. Bring the Defendant out. Obviously, I don't know what it is, and I asked y'all whatever day it was before we took the verdict in the case to everyone please be respectful and keep their emotions suppressed. And I ask for the same consideration now as I did then, and I appreciate everyone in court who has conducted themselves very well during this very stressful proceeding.

[1627] When we do get a verdict, assuming it's in proper form and we're ready to discharge the jury, I'm going to ask the jury to go ahead and be excused. And I'd like everyone to remain in court until the jury has had a chance to clear the hall and clear the building.

THE CLERK: I can take them out the back.

THE COURT: Bring them in.

(5:39 p.m.)

(Defendant present.)

(Jury present.)

THE COURT: Beth, let me see it, please. Mr. Foreman, would you publish the verdict of the jury, please?

THE FOREMAN: We, the jury, determine that the Defendant, Garrett Dutch, be sentenced to death.

THE COURT: All right. Will you hand that back to me, please, and let me make it a part of the court file? Everyone have a seat, please.

Ladies and gentlemen, on behalf of the Court, I want to express to you my heartfelt thanks for your participation in this trial. These are not easy cases. They're not easy on anyone involved, and I certainly respect the work and the effort, [1628] the attention that all of you have paid throughout this fairly lengthy proceeding.

We're prepared to excuse you now. We have your checks for your jury service, which is only a small token in relation to the sacrifices you've all made to be here and participate. I'm going to excuse you now, and I do thank you. You are relieved of the instruction. If you wish to discuss this case with anyone, you may do so. I would ask that you only do

one thing, and that is if you do find it appropriate to talk to someone, that you may share your thoughts, but don't share what some other jurors' thoughts were. Let every juror speak for themselves.

Unless I give permission to the parties, to the lawyers, no one will contact you after you've left the courthouse and left the area. But if you—if anyone asks outside what your thoughts were about it, like I say, if you want—You don't have to talk to anybody. If you just want to keep it to yourself, say I don't want to talk about it and that will be fine. But if you do want to discuss it with someone, share your thoughts, but not quoting what another juror's position was.

All right. Anything further from the State [1629] or Defendant before we excuse the jury?

MS. RICH: No, sir.

MR. HUGHES: No, sir.

THE COURT: All right. If y'all will go with Beth, she's going to give you your checks and let y'all be excused. Thank you.

(Jury not present, 5:42 p.m.)

APPENDIX F

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CASE NO. CC-2007-0788

STATE OF ALABAMA,

vs.

GARRETT DOTCH

Defendant.

We, the jury, determine that the defendant Garrett Dotch, be sentenced to death. The vote is as follows:

10 Death 2 Life imprisonment without parole

/s/ [Illegible]
Foreperson

We, the jury, determine that the defendant Garrett Dotch, be punished by life imprisonment without parole. The vote is as follows:

_____ Death ____ Life imprisonment without parole

_____
Foreperson

APPENDIX G

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CASE NO. CC-2007-0788

STATE OF ALABAMA,

v.

GARRETT DOTCH,

Defendant.

SENTENCING ORDER

Garrett Dotch was charged with capital murder in a two count indictment. Count I charged that the defendant caused the death of Timarla Taldon by use of a deadly weapon while she was inside a vehicle, an offense made capital by Ala. Code §13A-5-40(a)(17) (1975). Count II of the indictment charged the murder of Timarla Taldon stemmed from, was caused by, or related to Timarla Taldon's capacity or role as a witness, an offense made capital by Ala. Code §13A-5-40(a)(14) (1975).

The defendant entered pleas of not guilty, and not guilty by reason of severe mental disease or defect. A jury of eight white jurors and four black jurors was selected without a Batson violation. The jury, seven men and five women, returned a verdict finding the defendant guilty on Count I of the indictment and not guilty on Count II of the indictment. In accordance with the jury's verdict, the undersigned judge adjudged the defendant guilty of capital murder. Following the

verdict of guilty, a separate sentencing hearing was conducted before the same jury. The State and the defendant adopted the evidence each had presented during the guilt phase. The jury heard additional evidence of aggravating and mitigating circumstances. Ten jurors recommended a sentence of death, and two jurors recommended a sentence of life imprisonment without the possibility of parole. The Court ordered and received a written pre-sentence investigation report as required by Ala. Code §13A-5-47(b) (1975). Pursuant to Ala. Code §13A-5-47(c) (1975), the Court allowed the State and the defendant to present statements and arguments to the Court concerning the proper sentence to be imposed.

I. DETERMINATIONS OF FACT

A. Background Facts

The defendant was 24 years old when he murdered Timarla Taldon. His family can best be described as dysfunctional. He had very little, or no, family structure during his formative years. His mother has a long history of mental illness and drug abuse which resulted in the Department of Human Resources obtaining custody of the defendant when he was 8 years old. He moved between foster care and different relatives until he was 14 or 15 years old at which point he moved in with his 19 year old brother. The defendant's father spent most of the defendant's younger years in prison and was a drug addict. He did not acknowledge any relationship with the defendant until the defendant was in his late teens. The defendant's parents would steal what meager belongings the defendant and his older brother possessed in order to buy drugs.

The defendant was diagnosed with a seizure disorder at one year of age and was prescribed medication. He received medication from a mental health center at ten years of age. When taking his medication he was calm, without it he was described as hyperactive, destructive, and erratic. In 2004, his mother had the defendant committed to Searcy Hospital for his erratic behavior. After release from Searcy the defendant lived with his mother and seemed depressed. He refused to take his prescribed medications, or seek mental health treatment.

The defendant's high school record was average, and he played varsity sports. He quit high school when he was 16 years old and has never held a regular job. He began using street drugs, including cocaine and marijuana, about the time he quit high school. His drug use was continuous until the murder of Timarla Taldon.

Timarla Taldon was a college student pursuing a degree in accounting at the time of her death at age 24 years. She was two years away from graduating from college. She enjoyed a good and loving relationship with her family. She is survived by her parents and one brother.

Timarla and the defendant, Garrett Dotch, met during middle school, and at some point, their friendship developed into a dating relationship. Thereafter, Timarla moved from her parents' home and into her own apartment, where she and the defendant lived together for some time. Their dating relationship ended in 2002. The defendant did not date other women and continued to intrude into Timarla's life. He was apparently obsessed over the ending of their relationship.

In September, 2003, the defendant burglarized Timarla's apartment and assaulted her. He pled guilty to this charge and was sentenced to 15 years in prison, split to time served and placed on 5 years formal probation. Timarla filed a complaint against the defendant for domestic violence in May, 2005. He pled guilty and was sentenced to 180 days in jail.

Late on the evening of July 8th, 2006 or early on the morning of July 9th, the defendant loudly knocked on Timarla's apartment door and attempted to enter the apartment. She stopped him and called the police. Later that morning, he returned and attempted to convince her to leave the apartment, but she refused. The defendant also called Timarla many times during the two week period before her death. Cell phone records reflect he made 51 phone calls to her apartment on July 9, 2006. No calls were placed from Timarla's phone to the defendant during the two weeks preceding her death. Timarla's mother, Mrs. Sarah Dinkins, overheard one conversation on July 9, 2006 wherein the defendant cursed and threatened to kill Timarla. Timarla was shot to death by Garrett Dotch the next day.

B. Summary of the Crime

On July 10, 2006, Timarla Taldon reported for work at Subway at approximately 9:00 a.m. to prepare the lunch service. She normally left work after lunch, accompanied to her car by a co-worker, but on this day the co-worker was in the restroom, so Timarla left unaccompanied. At approximately 2:30 p.m., workers in the Subway heard gunshots and ran out a side door to find Timarla's car had rolled backwards from its usual parked location and had struck another car. The driver's door of her car was open. Timarla was slumped in the driver's seat with

her right hand in or on her purse and her left arm and left leg hanging from the open driver's door. Her pistol was seen in her open purse near her right hand. She was unresponsive and appeared dead. Co-workers carried her into the shop and laid her on the floor before calling for assistance. Timarla died from multiple gunshot wounds. Four bullets entered the left upper portion of her body and traveled to the right. This was consistent with her being seated in the car at the time she was fatally wounded. During their investigation of the crime scene, the police discovered Dotch's partial left palm print on the outside of Timarla's driver's door window. Four .45 caliber automatic spent shell casings were found in the car or near where it had been parked, and three .45 caliber bullets were discovered inside the car.

A customer at the McDonald's restaurant, located directly across a side street from the Subway, heard gunshots and observed a tall black male wearing a white tee-shirt and long, dark short pants trotting out of the Subway parking lot. This witness saw the man holding a black object, which she thought was a gun. Timarla's car was seen rolling backward until it struck another car in the Subway lot. The witness identified the defendant from a photo spread and made a positive identification of him in court as the person she saw trotting from the Subway lot after hearing gunshots. Two McDonald's employees gave very similar descriptions of the man they saw leaving the Subway lot after they heard gunshots. They also identified Garrett Dotch as the person they saw on the day of the murder.

On the morning of July 11, 2006, at approximately 7:15 a.m., Dotch appeared at Mobile Police Department Headquarters where he spoke to the lead detective on

the Taldon murder case. Dotch stated to the investigator that he heard the police were looking for him, but denied any knowledge of Timarla Taldon's death. The investigator described Dotch's appearance and ability to communicate on the morning of July 11th as being normal.

II. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

Pursuant to Ala. Code §13A-5-47(d) (1975), the Court now addresses each of the statutory aggravating circumstances listed in the Alabama Code:

1. Capital Offense Committed by a Person Under Sentence of Imprisonment: The State presented evidence and relies on this aggravator. Ala. Code §13A-5-39(7) (1975) defines the phrase "under sentence of imprisonment" as used in Ala. Code §13A-5-49(1) (1975) to include a person on probation. The defendant was convicted of burglarizing Timarla Taldon's apartment and was on probation for this sentence at the time of the murder. The defense does not challenge the existence of this statutory aggravating circumstance. The Court finds this circumstance does exist, and it is considered by the Court.

2. Defendant Previously Convicted of Offense Involving Use or Threat of Violence to the Person: The State presented evidence and again relies upon the conviction in the burglary charge for this aggravator. The indictment to which the defendant pled guilty alleges that the defendant unlawfully entered Timarla Taldon's residence and caused physical injury to her during the course of the burglary by "striking her about the face with his fist." Furthermore, a police detective responding to the burglary call

testified at trial that Timarla Taldon had suffered physical injuries during the burglary. The defense does not challenge the existence of this aggravator. The Court finds this aggravating circumstance does exist, and it is considered by the Court.

Both of these aggravating circumstances were proven beyond a reasonable doubt. The State argues that these two aggravating circumstances should be assigned greater weight because they arise from the same event, i.e., probation for burglarizing Timarla Taldon's apartment and causing her violent injury. A counter-argument could be made that one event should not be used to prove two separate aggravators. The Court finds the existence of both aggravating circumstances, but assigns them no more weight because they both arise from the same event.

3. Other Statutory Aggravators: The Court does not find support for the remaining statutory aggravating circumstances, but the Court makes the following specific findings.

a. Great Risk to Many Persons: The State did not allege, nor offer any proof, that Dotch's actions posed a great risk to many persons. Accordingly, the Court finds that this aggravator does not exist and assigns it no weight.

b. Avoiding Arrest/Escape: The State did not allege, nor offer any proof, that Dotch was avoiding arrest or escaping from legal custody when he committed the murder. Accordingly, the Court finds that this aggravator does not exist and assigns it no weight.

c. Pecuniary Gain: The State did not allege, nor offer any proof, Dotch murdered Timarla Taldon

for pecuniary gain. Accordingly, the Court finds that this aggravator does not exist and assigns it no weight.

d. Hindering Law Enforcement: The State did not allege, nor offer any proof, that Dotch committed the murder to hinder law enforcement or another governmental function. Accordingly, the Court finds that this aggravator does not exist and assigns it no weight.

e. Heinous, Atrocious, and Cruel: The State did not allege, nor offer any proof, that Dotch committed the murder in an especially heinous, atrocious, or cruel manner compared to other criminal offenses. Accordingly, the Court finds this aggravator does not exist and assigns it no weight.

f. Multiple Victims: The State did not allege, nor offer any proof, that Dotch murdered two or more persons during one scheme or course of conduct. Accordingly, the Court finds that this aggravator does not exist and assigns it no weight.

g. Series of Intentional Killings: The State did not allege, nor offer any proof, that Dotch committed this capital offense as part of a series of intentional killings. Accordingly, the Court finds that this aggravator does not exist and assigns it no weight.

B. Mitigating Circumstances

Ala. Code §13A-5-47(d) (1975), requires this court to consider and discuss each of the statutory mitigating circumstances, as well as any non-statutory mitigating circumstances.

1. Statutory Mitigating Circumstances

a. No Prior Significant Criminal History: The defendant did not allege, nor offer any proof, that

Dotch lacked a prior significant criminal history. *See* Ala. Code §13A-5-45(g) (1975) (stating that, if the existence of a mitigating circumstance is in dispute, "the defendant shall have the burden of interjecting the issue"). On the basis of the guilty pleas discussed above, the Court finds this mitigating circumstance does not exist and assigns it no weight.

b. Extreme Mental or Emotional Disturbance: The defense injects this mitigator and supports it with the testimony of Dr. Van Rosen, a forensic and clinical psychologist, and the defendant's family members. Dr. Van Rosen testified extensively regarding his opinions in support of the defendant's plea of insanity during the guilt phase of the trial. Based on those opinions, he concluded that the defendant, at the time of committing the offense, was under the influence of extreme mental or emotional disturbance. The defendant's family members thought he was depressed in the months preceding the murder because he would stay in bed for extended periods of time. After February 2006, the defendant's father would visit him on Sundays and would find him in bed under the covers in a fetal position.

There is no indication that the defendant was mentally or emotionally disturbed by any influence other than his jealous obsession with the victim. He did not take his prescribed medications and continued to use cocaine. He was able to obtain a pistol, wait for the victim to leave her work, shoot her four times, and flee the scene to avoid apprehension. He appeared normal in a police interview the day following the murder.

Dotch deliberately broke into the victim's apartment and assaulted her. He pled guilty to acts of domestic violence against her, repeatedly called her

and at least once, threatened her life. Even if this conduct taken as a whole would demonstrate a mental or emotional disturbance, it does not serve to support a finding of this mitigator under these circumstances. The Court finds Dotch was not suffering from a "severe mental or emotional disturbance" at the time of the murder. Accordingly, this statutory mitigator does not exist, and the Court gives it no weight.

c. Victim Participation: The defendant did not allege, nor offer any proof, the victim in any way participated in her own murder. Accordingly, the Court finds that this mitigator does not exist and assigns it no weight.

d. Relatively Minor Accomplice: The defendant does not allege, nor offer any proof, that Dotch was acting as an accomplice when he killed Timarla Taldon. Accordingly, the Court finds that this mitigator does not exist and assigns it no weight.

e. Substantial Domination of Another Person: The defendant does not allege, nor offer any proof, Dotch was under extreme duress or under the substantial domination of another person when he committed the offense. Accordingly, the Court finds that this mitigator does not exist and assigns it no weight.

f. Substantially Impaired Capacity: The defense injects this mitigator. Dr. Van Rosen testified the defendant has a full scale I.Q. of 77 and suffers from a delusional disorder, polysubstance abuse and personality disorder. Dr. Van Rosen relied upon these diagnoses, the history of mental illness suffered by the defendant's mother, and the defendant's own history of mental treatment to support his opinion that the defendant suffered from a severe mental disease

or defect at the time of the commission of the offense. The jury rejected the mental disease or defect defense in finding the defendant guilty of intentional murder. The State presented Dr. Douglas McKeown, a psychologist, who testified that the defendant's only mental difficulties resulted from his continuous use of cocaine. He diagnosed the defendant with personality disorder with anti-social features, polysubstance abuse, a history of possible thought disturbance, and low average intelligence. No evidence was presented to indicate cocaine abuse lowered the defendant's mental capacity or impaired his ability to understand "the requirements of law", or the consequences of his actions at the time of the murder.

The jury's rejection of the defendant's argument for a lesser-included conviction for manslaughter based on a voluntary intoxication theory demonstrates that the jury believed the defendant was able to "appreciate the criminality of his conduct" and that his ability to "conform his conduct to the requirements of law was [not] substantially impaired." In finding the defendant guilty of capital murder, the jury necessarily rejected the theory that he was so intoxicated by illegal drugs that he failed to form an intent to commit murder.

The Court does not disagree with the jury's conclusion to reject the plea of insanity. The deliberate manner in which the defendant carried out the commission of the offense, coupled with a prior threat to commit the offense, does not demonstrate that the defendant suffered from a diminished mental capacity. The Court specifically finds the defendant was not substantially impaired in his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Accordingly, this

statutory mitigator is found not to exist, and the Court gives it no weight.

g. The Age of the Defendant: The defendant did not allege, nor offer any proof, that the age of the defendant was a factor to be considered. Accordingly, the Court finds that this mitigator does not exist and assigns it no weight.

2. Non-Statutory Mitigating Circumstances: Under Ala. Code §13A-5-47(d) (1975), this Court must also consider each of the non-statutory circumstances interjected by the defense. Under Ala. Code §13A-5-52 (1975), this Court recognizes that a non-statutory mitigating circumstance may include evidence concerning the defendant's character, life, or record; the facts of the crime; mercy for the defendant; and any other relevant information for sentencing purposes.

Because the possible non-statutory mitigators are wide ranging, it is difficult to list them in a particular category. The Court's consideration of non-statutory mitigators is based on the defendant's requested jury instructions for mitigating circumstances and any additional circumstances heard during the guilt or sentencing phase. This Court has considered each of these non-statutory mitigating circumstances. To the extent that some evidence, theory, or testimony concerning a non-statutory mitigator does not fit into a category below, this Court states that it considered all relevant evidence produced by the defendant and gave such evidence its appropriate weight.

a. Lack of Stable and Nurturing Environment: The defendant was born out of wedlock while his mother was in a mental facility due to a nervous breakdown. She was in mental health care facilities, including Searcy Hospital, 12 to 14 times with a

diagnosis of paranoid schizophrenia during the defendant's childhood. The defendant's mother became addicted to crack cocaine when he was about 8 years old and remained under its influence for many years. The defendant's father spent most of the defendant's youth in the penitentiary and addicted to drugs. When the defendant's father and mother were together, their relationship was marked by physical violence often committed in the presence of the defendant. As a result of the mother's mental illness and drug abuse, the defendant was placed in the custody of the Department of Human Resources at age 8. After several years of foster care, the defendant lived with one or more of the mother's brothers and sisters and for some time lived with a grandmother.

When the defendant was 14 or 15 years of age, he was confronted by his father in a violent manner while at his grandmother's home. As a result of this confrontation, the defendant moved into an apartment with his 19 year old brother who thereafter provided the only support and guidance the defendant received. The defendant's father and mother would visit the apartment in order to steal their children's belongings and sell them for drugs. The defendant did not learn that the man involved in these events was his father until he was almost 20 years old. The defendant's mother received a social security check for the defendant and would use it to support her drug addiction, although on occasion she would give him some part of the check. The defendant never had a stable wholesome home place or father to provide him supervision and guidance. Any parental influence was provided by foster care or the various siblings of his mother with whom he occasionally and temporarily resided. From age 14 or 15, his only supervision was provided by a brother

approximately six years older. Accordingly, this Court finds this non-statutory mitigator does exist and gives it some weight. The weight given is not substantial, because many people in our society are exposed to the same troubling conditions but refrain from senselessly murdering innocent victims. The defendant's older brother shared the same parents and suffered many of the same circumstances as the defendant. Yet, he worked, was productive and provided for the welfare of others.

b. Drug Abuse: The defense urges that the defendant's undisputed long-term abuse of illegal drugs justifies the finding of a non-statutory mitigating circumstance. This issue was considered above in the discussion of "diminished capacity." This Court considers voluntary long term use of illegal drugs to be a non-statutory mitigating circumstance but assigns it little weight. No evidence was presented concerning the quantity or timing of the defendant's drug use prior to the murder or any possible effect on his appreciation of the wrongfulness of his actions. Additionally, voluntary drug use never excuses criminal conduct.

c. Mental Status: The Court has considered the defendant's mental health status in conjunction with the statutory mitigating circumstances of "extreme mental or emotional disturbance" and "diminished capacity." The Court found that the defendant's mental health status does not support a finding of the existence of either of these statutory mitigating circumstances. However, it is undisputed that the defendant has had mental health problems throughout his life, which have occasionally been treated. The Court finds this to be a non-statutory mitigating circumstance and assigns it some weight.

However, this weight is small because the defendant has refused both to pursue available mental health treatment and to take medication prescribed to alleviate his condition. According to the observations of those close to him, the medication was capable of stabilizing Dotch's otherwise erratic demeanor. The defendant's justification for avoiding his medication was that it "slowed him down".

d. Capacity to Love and Care: The defendant's mother testified that the defendant had the capacity to love and care for others. Specifically, she testified the defendant would use part of his social security check to buy things for other family members and on occasion insisted that she buy shoes for the other children before buying any for him. The Court received a letter from the defendant dated May 31, 2008. It was provided to the assistant district attorney and defense counsel and made a part of the record. The defendant wrote he continues to love the victim, attributing his actions to a heavy use of powder cocaine and mental instability. He accepts responsibility for his actions and asks the Court for leniency. This Court finds this non-statutory mitigator does exist and assigns it some weight.

e. Mercy: The defendant, his attorneys and family plead for mercy. In addition to the letter received from Garnett Dotch, the Court received letters from his family members and a former basketball coach. Those calls for mercy cannot be rebutted by the State. The Court is also mindful of the tragic and irreplaceable loss suffered by the victim's family and friends. However, this non-statutory mitigator was injected by the defense, is found to exist and is given some weight.

C. General Comments

The defense argues the victim's location in a vehicle was an "accident of circumstances" and that had this murder taken place moments before the victim entered her vehicle, or at some other location, the defendant would not have been indicted on a capital charge. The defendant in *May vs. State*, 710 So.2d 1362 (Ala. Crim. App. 1997) attacked his conviction under Ala. Code §13A-40(17) (1975) arguing his rights were violated. He based his equal protection challenge on his ineligibility for parole on conviction in contrast to the availability of parole to others convicted of murder. The Appellate Court found a rational basis for the legislature's recognition of murder of a victim in a vehicle as a capital offense. The Court reasoned that an out of control vehicle of a mortally wounded victim could pose a substantial threat of injury to the public. This Court finds the defense's argument inappropriate in considering the proper sentence to be imposed in the present case.

The State does not always seek imposition of the death penalty in a capital murder case. In fact, the defendant himself in the above mentioned letter to the Court described two capital murder defendants housed in jail with him who were allowed to plead to capital murder and received sentences of life without the possibility of parole. This Court does not have, and should not have, any influence over the District Attorney's Office in its exercise of discretion over the appropriate punishment to seek in capital cases. This Court has found that the State did not argue, nor offer any proof, in support of a finding of the statutory aggravating circumstance set out in Ala. Code §13A-5-49(8) (1975) ("especially heinous, atrocious, or cruel compared to other capital offenses"). This Court

has found this aggravator does not exist and has given it no weight. Having done so, this Court did not compare the heinousness of this crime with other crimes. That responsibility is placed on the appellate courts. See Ala. Code §13A-5-53(b)(3) (1975).

III. JURY'S RECOMMENDATION

Under Ala. Code §13A-5-47(e) (1975), this Court is required to consider the jury's recommended sentence in addition to the aggravating and mitigating circumstances found to exist. Here, the jury recommended death by a 10-2 vote. This Court considered the jury's recommended sentence and gave it due weight under the law. The Court did not consider the recommendation of the jury to be an aggravating circumstance. The Court observed the jury during the guilt and penalty phase of the trial. Each juror paid close attention to the evidence presented and to the arguments of counsel. The jurors took their duties very seriously. Nothing evidenced a prejudice on the part of a juror.

IV. CONCLUSION

The Court has considered and weighed all applicable aggravating and mitigating circumstances. In recommending a sentence of death, the jury determined the aggravating circumstances in this case outweighed the mitigating circumstances. This Court does not disagree with the jury's determination.

Timarla Taldon was a young woman loved by her family, and she did not deserve her fate. She supported herself while continuing her education. Garrett Dotch tormented her and would not let her live in peace. He twice plead guilty to committing crimes against her, yet he continued to harass and

threaten her. Garrett Dotch, acting with unexplainable malice, violently ended Timarla Taldon's promising young life.

It is ORDERED, ADJUDGED, and DECREED that Garrett Dotch is sentenced to death by lethal injection. Pursuant to Alabama Rule of Appellate Procedure 8(d)(1), the date of execution is to be set by the Alabama Supreme Court at the appropriate time.

Done this 23rd day of July, 2008.

/s/ [Illegible]
Circuit Judge

APPENDIX H

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CC- 2007- -0788

STATE OF ALABAMA,

v.

GARRETT DOTCH,

Defendant.

MOTION FOR NEW TRIAL

NOW COMES the Defendant and moves the court pursuant to Rule 24.1 of the Alabama Rules of Criminal Procedure to vacate the conviction and sentence in this case and grant a new trial. As grounds for this motion the defendant would show as follows:

1. The defendant was found guilty of capital murder under Alabama Code § 13A-5-40(a)(17). The court should find that provision of the Alabama capital sentencing scheme an unconstitutional violation of the Eighth Amendment and due process guaranteed by the Fourteenth Amendment. To pass constitutional muster a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Alabama Code § 13A-5-40(a)(17) fails this test. The only distinction between intentional murder and capital murder is the wholly arbitrary difference in the location of the

victim. The location of the victim does not "reasonably justify" eligibility, for the most severe penalty-death.

2. The Alabama capital sentencing scheme is unconstitutional under *Ring v. Arizona*, specifically in that it does not require the jury to find unanimously the facts supporting a capital sentence

3. The sentence of death imposed on the defendant is disproportionate to the crime of which the defendant was convicted, that is, a domestic-violence type murder.

4. The capital murder indictment in this case, and the state's decision to seek the death penalty, is a manifestation of selective, arbitrary and inconsistent prosecution. The Alabama death penalty statute, as applied here, is unconstitutional in violation of the Eighth and Fourteenth Amendments.

5. The sentence of death was disproportionate to sentences received by others convicted of the same offense. The Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires the sentencing judge before it imposes a death sentence, to compare the sentence in the case before it with others similarly situated. The court here did not do so.

6. The jury's 10-2 death verdict came after the court erroneously limited the mitigation testimony, in violation of the requirement of *Hitchcock v. Dugger*, 481 U.S. 393 (1987) that the jury be entitled to consider all non-statutory mitigating circumstances. Because a transcript of the penalty phase of the trial is not yet available, this ground will be supplemented.

7. The conviction on count one of the indictment should he vacated because of the jury's acquittal on count two. It was only because of the joiner of count two in the indictment that the state was permitted to introduce the defendant's prior convictions in the guilty phase and extensive evidence of the underlying facts. Such evidence was irrelevant and would have been inadmissible as to count one of the indictment, but nonetheless was considered by the jury and prejudiced the defendant as to count one.

8. The verdict of guilt should be set aside because the State failed to prove a prima facia case of each element of the capital offense charged.

9. The defendant requests that the court grant a 30 day extension of time within which to supplement this motion for new trial so as to permit the completion of the transcripts of all of the proceedings, including the jury organization and selection, the statements and argument of counsel, the charge to the jury, the trial and penalty phase, and the sentencing hearing before the court.

/s/ Arthur J. Madden, III
Arthur J. Madden, III
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of August, 2008 I served a true and correct copy of the foregoing document by first class mail, postage prepaid on:

Ashley Rich, Esq.
Assistant District Attorney
Mobile County Courthouse
Mobile, Alabama 36603

/s/ Arthur J. Madden, III
Arthur J. Madden, III

STATE OF ALA. MOBILE CO.
WHEREBY CERTIFY THIS
PLEADING WAS FILED ON
2008 AUG 22 PM 12:43

APPENDIX I

State of Alabama v. Garrett Dotch
Case No. CC-2007-0788

Trial Transcript Excerpt - Sentencing Phase
Discussion Concerning "Under Sentence of Imprisonment" Aggravator
(May 13, 2008)

* * *

(3:25 p.m.)

(Defendant present with Counsel, and Assistant District Attorneys Ashley Rich and Jennifer Wright.)

(Jury not present.)

MS. RICH: There are a couple of things that we need to take up before we begin. Back in June of 2007, the State filed its notice of aggravating circumstances pursuant to the rules. The first notice of aggravating circumstances was that the capital offense was committed while the Defendant was under sentence of imprisonment in accordance with 13A-5-49(1), and copies of all of the priors that the Defendant—prior felony convictions of the Defendant were given to the Defense being CC 01-855, the possession of controlled substance that the Defendant was on probation for at the time that he committed this offense as well as CC 04-1354 and CC 04-1355 of which the Defendant was on probation for at the time that he committed these offenses.

THE COURT: That was the burglary and the [1432] assault?

MS. RICH: And the assault. The Defendant was on probation for all three of those offenses at the time that he committed this offense, and all three of those would satisfy the State's first aggravating factor of the capital offense was committed while the Defendant was under sentence of imprisonment under 13A-5-49(1).

I seem to have put my Code up in my desk. Thank you. It is a felony specified in 49—Just let me verify this real quick first. No, it is not a felony under 49(1). The capital offense was committed by a person under sentence of imprisonment. He was under sentence of imprisonment and probation. We would contend that probation was a sentence of imprisonment under the split sentence he had far the burglary and possession of cocaine.

THE COURT: My reading of the law is, is that if a person is on parole or probation, they remain under a sentence of imprisonment.

MS. RICH: Right. And he was on probation for the felony offenses of burglary and possession of cocaine, not the assault. So, we would maintain that in the CC 01-855, possession of cocaine—[1433] that's why I had her get the evidence because I want to be sure—and CC 04-1354, the burglary first degree would satisfy the State's first aggravating circumstances charge.

And I bring this up because prior to now, the evidence of the possession of controlled substance has not been admitted. And I just wanted to let Your Honor know that we do now intend to introduce a certified copy of the docket sheet during this phase of the trial to prove the aggravating circumstance enumerated—

THE COURT: Yeah, before I hear from you, Mr. Hughes, let me just ask you this: Have you verified that, in fact, on July 10th 2006, that the Defendant remained on probation on the cocaine case and the burglary case, I mean, to make sure that he had not EOS'd or otherwise had his term of probation expire?

MS. RICH: As of the last docket entry on May 7th 2004, the—there was a—on May 7th 2004, the probation revocation that was currently on file had been withdrawn. However, Joseph Crum reported to me that he was on probation, but I will verify that—

THE COURT: Is that the cocaine case you hold [1434] in your hand?

MS. RICH: Yes. It's not on the docket sheet.

THE COURT: What was the sentence imposed and what was the date of the sentence from the circuit judge?

MS. RICH: The sentence was imposed on March 13th 2002.

THE COURT: What was the sentence?

MS. RICH: It was a three suspended for three. However, that was tolled for a number of times, Your Honor, because there were numerous delinquency reports filed and withdrawn and filed and withdrawn. What I'll do, Judge, is I need to get the probation officer here to take testimony about this.

THE COURT: I think so. I think you need—It's tricky to calculate when the tolling started and when the tolling of probation stopped so that probation started going forward again. And certainly, I'll allow you to have—I think it's 3:30. We're probably not going to send this to the jury this afternoon, so I will give you that opportunity. And if it be that you have

finished everything else today and Mr. Hughes is ready to [1435] proceed, I will let you—I will leave—give you leave to bring that additional information in tomorrow.

MS. RICH: Okay.

THE COURT: Do you have any preliminary thoughts about that, Mr. Hughes, as to whether or not she can use the cocaine conviction?

MR. HUGHES: Judge, if they did not—if the judge that was involved in these revocations, if he did not extend the probation, I don't think just the fact that there is a petition filed or he is locked up, I don't think that stops it from running on if the judge does not extend it beyond that period of time.

THE COURT: Well, if he was sentenced on March the 13th of '02 and he had three years' custodial sentence suspended for a period of three years of probation, then on the surface, it, of course, would have expired on March 13th of '05.

MR. HUGHES: Yes, sir.

THE COURT: My general understanding is consistent with Ms. Rich, that when the probation officer files the delinquency, that stops that period from running. And until there's adjudication on the delinquency by the judge, that [1436] there is a tolling period. So that, for example, if a person were to abscond, there would be a delinquency filed on the end of the first year of a three-year probation and the defendant was not apprehended for five years, they would still be on probation.

But back to the essence that if it be that she can show that he was still on probation, do you have any—She says she gave you notice for aggravating

circumstances purposes that she intended to use the cocaine conviction, which we have pretty meticulously stayed away from during the guilt phase. So, you did get notice of that?

MR. HUGHES: Yes, sir, we got that one. If we'd just be allowed to be heard whenever we get to that point before she does it.

THE COURT: Sure. Yeah, we'll have to get into that a little bit deeper. Anything else, Ms. Rich, before we bring them in?

MS. RICH: No, sir.

RECORD AND BRIEFS

No. 10-1270

Supreme Court, U.S.
FILED
MAY 18 2011
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In the
Supreme Court of the United States

GARRETT DOTCH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to
the Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 18, 2011

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW
(Rephrased)

1. Should this Court grant certiorari to review Garrett Dotch's claim that *Ring v. Arizona* mandates that a jury, as opposed to a trial court, must determine, unanimously and beyond a reasonable doubt, the existence of each and every statutory aggravating circumstance on which a death sentence is based where that claim was not raised or addressed in the lower court and where any decision with regard to that question will not affect the outcome in this case?

Table Of Contents

Question Presented For Review i

Table Of Contents ii

Table Of Authorities iv

Statement Of The Case 1

A. The Proceedings Below 1

B. Statement of the Facts 4

Reasons For Denying The Petition 8

I. Dotch's Death Sentence Does Not Implicate *Ring v. Arizona* Because The Two Aggravating Circumstances That Were Found To Exist In His Case Relate To His Prior First-Degree Burglary Conviction 8

A. Certiorari Should Be Denied Because Dotch's Claim Was Not Properly Raised In The Lower Court 9

B. Certiorari Should Be Denied Because Resolving The Purported Split Will Not Affect The Outcome In Dotch's Case 12

1. *Apprendi* and *Ring* do not even arguably apply here because the fact at issue falls within the *Almendarez-Torres* exception. 13

2. Any asserted error would be harmless in Dotch's case. 21

CONCLUSION 22

APPENDIX

Brief of Appellant to the Court of Criminal Appeals – Issue XVII 1a

Application for Rehearing of Appellant Garrett Dotch and Brief in Support of Application for Rehearing – Issue XVII 4a

Petition for a Writ of Certiorari – Section C 6a

Table Of Authorities

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Almendarez-Torres v. United States,
523 U.S. 224, 118 S. Ct. 1219 (1998) ..... passim

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530 U.S. 466, 120 S. Ct. 2348 (2000) ..... passim

Dotch v. State,
CR-07-1913, 2010 WL 1260162 (Ala. Crim.
App. Apr. 2, 2010) 4, 11

Ex parte Waldrop,
859 So. 2d 1181 (Ala. 2002) 10, 13, 2

James v. United States,
550 U.S. 192, 127 S. Ct. 1586 (2007) 18

Jones v. United States,
526 U.S. 227, 119 S. Ct. 1215 (1999) 16

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827 (1999) 21

Rangel-Reyes v. United States,
547 U.S. 1200, 126 S. Ct. 2873 (2006) 19

Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428 (2002) ..... passim

Taylor v. Freeland & Kronz,
503 U.S. 638, 112 S. Ct. 1644 (1992) 12

United States v. Pineda-Arrellano,
492 F.3d 624 (5th Cir. 2007) 19

STATUTES

Code of Alabama
§ 13A-5-39(7) 2
§ 13A-5-40(a)(14) 1
§ 13A-5-40(a)(17) 1
§ 13A-5-49 13
§ 13A-5-49(1) 2, 17
§ 13A-5-49(2) 2, 17
§ 13A-5-51(1) 20
§ 13A-5-51(2) 2
§ 13A-5-51(6) 3
§ 13A-5-51(7) 3

RULES

Alabama Rules of Appellate Procedure
Rule 40(a)(2)(B) 11

STATEMENT OF THE CASE

A. The Proceedings Below

On March 9, 2007, Garrett Dotch was indicted by the Grand Jury of Mobile County, Alabama on two counts of capital murder. Count One of the indictment charged Dotch with the capital offense of the murder of Timarla Taldon by or through the use of a deadly weapon while Ms. Taldon was inside a vehicle, in violation of Ala. Code § 13A-5-40(a)(17). (C.R. 26.)[1] Count Two of the indictment charged Dotch with the capital offense of the murder of Ms. Taldon by shooting her when she was or had been subpoenaed to testify, or had testified, in a criminal trial or proceeding and the murder stemmed from, was caused by, or was related to her role as a witness, in violation of Ala. Code § 13A-5-40(a)(14). (C.R. 26.) The Honorable Roderick P. Stout presided over Dotch's trial.

On May 13, 2008, a Mobile County jury found Dotch guilty of the capital murder of Ms. Taldon under Count One of the indictment. (C.R. 27; R. 1428.) The jury found Dotch not guilty of capital murder under the second count of the indictment. (R. 1428.) Following the presentation of evidence, closing arguments, and instructions from the trial court, the jury, on May 14, 2008, recommended by a vote of ten to two that Dotch be sentenced to death. (C.R. 28; R. 1627.)

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[1] References to the record will appear in this brief as follows: references to the clerk's record on direct appeal and references to the reporter's transcript on direct appeal will appear, respectively, as "C.R.__." and "R.__."

Critically, for present purposes, the trial court instructed the jurors that they could consider only the following two statutory aggravating circumstances in determining whether to recommend a sentence of death or life without parole for Dotch: (1) the capital offense was committed by a person under sentence of imprisonment, pursuant to Ala. Code § 13A-5-49(1)[2]; and, (2) the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, pursuant to Ala. Code § 13A-5-49(2). (R. 1607-1610.) The trial court repeatedly informed the jurors that the State had the burden of proving the existence of the aggravating circumstances and that they were required to unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt before they could begin the process of weighing the aggravating circumstances against the mitigating that would lead them to determine which sentence to recommend for Dotch. (R. 1608-1610, 1612.)

The trial court instructed the jurors that they could consider the following statutory mitigating circumstances: (1) the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, pursuant to Ala. Code § 13A-5-51(2); (2) the capacity of the

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[2] Ala. Code § 13A-5-39(7) defines the term, "under sentence of imprisonment," as follows: "As used in Section 13A-5-49(1), the term means while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or freedom while or after serving a term of imprisonment, other than unconditional release and freedom after expiration of the term of sentence."

defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, pursuant to Ala. Code § 13A-5-51(6); and, (3) the age of the defendant at the time of the crime, pursuant to Ala. Code § 13A-5-51(7). (R. 1610-1611.) The trial court further instructed the jurors that they could consider as a mitigating circumstance any aspect of Dotch's character or record and any of the circumstances of the offense that Dotch offered as a basis for a sentence of life without parole instead of death. (R. 1611.)

The trial court conducted its own sentencing hearing in this matter on June 26, 2008, during which the court heard the testimony of several witnesses and the arguments of counsel. On July 23, 2008, the court followed the recommendation of the jury and sentenced Dotch to death. (C.R. 554-575.)

In its order sentencing Dotch to death, the trial court made specific findings of fact regarding the aggravating and mitigating circumstances. The court found that the State satisfied its burden of proving the existence of the aforementioned two aggravating circumstances beyond a reasonable doubt. (C.R. 560-561.) In addition, the court noted that Dotch "does not challenge" the existence of either of those aggravating circumstances. (C.R. 560-561.)

The trial court did not find the existence of any statutory mitigating circumstances. (C.R. 563-527.) But, the court stated that it considered all of the relevant evidence that was presented by Dotch during the penalty and sentencing phases of his trial, and the court found the existence of the following

non-statutory mitigating circumstances: (1) Dotch's lack of a stable and nurturing environment; (2) Dotch's voluntary, long-term use of illegal drugs; (3) Dotch's history of mental health problems; (4) Dotch's remorse for his crime and his ability to love and care for others; and, (5) the pleas for mercy that were made by Dotch, his family members, and his counsel. (C.R. 568-572.) The trial court concluded that the aggravating circumstances outweighed the mitigating and accordingly sentenced Dotch to death. (C.R. 574-575.)

On April 2, 2010, the Alabama Court of Criminal Appeals affirmed Dotch's capital murder conviction and death sentence. *Dotch v. State*, CR-07-1913, 2010 WL 1260162 (Ala. Crim. App. Apr. 2, 2010). On June 11, 2010, that court overruled his application for rehearing. *Id.* The Supreme Court of Alabama denied his petition for writ of certiorari on January 14, 2011. See Pet. App. C.

B. Statement of the Facts

Garrett Dotch and Timarla Taldon met in middle school and began dating while they were in high school. (R. 964, 975.) After Timarla graduated in 2001, she and Dotch lived together in an apartment. (R. 975.) Their relationship ended the following year, and she moved into an apartment of her own. (R. 966-967.)

Lieutenant Stephanie Smith of the Mobile Police Department testified that she responded to a complaint that Timarla's apartment had been burglarized on September 1, 2003. (R. 815-816.) According to Lieutenant Smith, the door of Timarla's residence "had been kicked in and it was splintered

where it had been kicked." (R. 817.) She testified that Timarla had been injured during the burglary, and she specifically recalled that there were bruises on her face and blood inside one of her eyes. (R. 817.) Dotch was arrested in connection with that crime, and he subsequently pleaded guilty to the charges of first-degree burglary and third-degree assault. (R. 818-819.) Although he was sentenced to fifteen years on each of those convictions, Dotch's sentence was split to time-served, and he was placed on probation for five years. (C.R. 641.)

Officer Michael James of the Mobile Police Department testified that he responded to a domestic violence complaint at Timarla's apartment on May 15, 2005. (R. 833-834.) Based on Timarla's complaint, an arrest warrant was issued for Dotch on the charge of domestic violence in the third degree. (R. 834.) Dotch pleaded guilty to that offense, and he was sentenced to 180 days imprisonment. (C.R. 646; R. 836, 892-893.) Officer Joseph Crum of the Alabama Board of Pardons and Paroles testified that he filed a delinquency report alleging that Dotch had violated the terms and conditions of his probation based on his domestic violence conviction, and he testified that Dotch's probation accordingly was revoked for 180 days to run concurrent with his sentence for that offense. (R. 892-893.) Officer Crum further testified that he instructed Dotch to have no more contact with Timarla. (R. 896) Dotch ignored that instruction.

Sarah T. Dinkins, Timarla's mother, testified that she spent the first week of July 2006 at her daughter's apartment. (R. 962, 967-968.) Mrs. Dinkins stated that Dotch called Timarla numerous

times during that week and that either she or Timarla spoke with him when he called. (R. 968.) She testified that she repeatedly told him that Timarla did not want any contact with him and implored him to leave her daughter alone. (R. 968.) Mrs. Dinkins returned to her home on July 8, 2006, but two of Timarla's cousins remained with her at her apartment. (R. 949, 968.)

Jiquisa Thomas, Timarla's cousin, testified that she stayed with Timarla at her apartment from July 1, 2006 until the day that Dotch murdered Timarla. (R. 948-949.) According to Jiquisa, someone began banging on the door of Timarla's apartment at approximately 2:00 a.m. or 3:00 a.m. on July 9, 2006. (R. 950-951.) Jiquisa saw Dotch standing outside the apartment, and she informed Timarla that he was the person banging on the door. (R. 951-952.) When Timarla went to the door, Dotch tried to force his way into her apartment, but she was successful in preventing him from doing so. (R. 952.) Dotch left, but he returned later that morning. (R. 953.) On this occasion, Dotch told Timarla that he had placed money for her under her car and asked her to come outside. (R. 953.) Timarla refused his request, and she told him that he needed to leave and that she was calling the police. (R. 953.) He left before the police arrived. (R. 953-954.)

Later that day, Dotch called Timarla, and, without his knowledge, she put him on a three-way call with her mother. (R. 971.) Mrs. Dinkins testified that she heard Dotch curse Timarla and tell her that he was going to kill her. (R. 972.) Upon hearing that threat, Mrs. Dinkins asked him why he would want to kill Timarla and again begged him to

leave her daughter alone. (R. 972.) Dotch then hung up the phone. (R. 972.) But, Dotch continued to call Timarla that day. (R. 973.) In fact, Agent Ben Kinsey of the Federal Bureau of Investigation testified that Dotch placed approximately 88 phone calls to Timarla in the two weeks preceding her murder, including 51 calls to her apartment on July 9, 2006. (R. 925-928.)

On the afternoon of July 10, 2006, shortly after finishing her shift at a Subway sandwich shop, Timarla took off her apron, collected her belongings, and walked alone to her car. (R. 680-681, 683.) According to the testimony of Willie Rodgers, her close friend and co-worker, Timarla parked her vehicle behind the sandwich shop on that day, just as she normally did. (R. 681.)

Timarla was approached by a black male, in his early to mid-twenties, wearing a white tee-shirt and long, denim shorts, and carrying a gun, as she was walking toward her car. (R. 694, 707-708, 722.) After Timarla got in her vehicle, the man shot her multiple times with a .45 caliber pistol. (R. 722, 724, 745-749.) He then fled the scene on foot. (R. 693, 708-709, 735.)

Mr. Rodgers testified that a woman who was employed by the McDonald's fast food restaurant that was adjacent to the Subway sandwich shop ran into the shop to inform him and his co-workers that something had happened. (R. 683.) Mr. Rodgers then hurried outside to check on Timarla and found her dead in her vehicle. (R. 683.) He and one of his co-workers carried Timarla inside the store and laid her on the floor. (R. 684.) Emergency personnel

arrived soon thereafter and declared that she was dead. (R. 688.)

Multiple eyewitnesses identified Dotch as the man who shot Timarla. (R. 695, 702, 708, 717-718, 723, 726-727.) In addition, fresh latent palm prints, positively matching Dotch, were found on Timarla's car door. (R. 786-787, 790-793, 802-803.) Dr. Karen Kelly, a forensic pathologist who is employed as a state medical examiner by the Department of Forensic Sciences, testified that she performed the autopsy on Timarla. (R. 983, 990.) Dr. Kelly opined that Timarla's official cause of death was multiple gunshot wounds. (R. 1002.)

REASONS FOR DENYING THE PETITION

I. Dotch's Death Sentence Does Not Implicate *Ring v. Arizona* Because The Two Aggravating Circumstances That Were Found To Exist In His Case Relate To His Prior First-Degree Burglary Conviction.

Dotch contends that this Court should grant certiorari to resolve a split among the state courts regarding the role of the jury in determining the existence of statutory aggravating circumstances in death penalty cases. Pet. at 6. Specifically, Dotch asks this Court to determine whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), mandates that a jury must find, unanimously and beyond a reasonable doubt, the existence of every statutory aggravating circumstance on which a death sentence is based. Pet. at 6-9. Dotch's assertion that there is a split here is, in the very least, exaggerated. Although Dotch claims that the Supreme Courts of Indiana and Nebraska have definitively weighed in

on this issue, he cites only isolated language from those courts, not any holdings that reveal that they have thoroughly considered the matter. Even if there is a split as deep and as clear as Dotch claims, this Court should still deny certiorari for at least two reasons: (1) Dotch did not raise this claim in the lower court; and, (2) his case is a poor vehicle for deciding this claim because, even if there is a split here, the resolution of the split will not alter the outcome in his case.

A. Certiorari Should Be Denied Because Dotch's Claim Was Not Properly Raised In The Lower Court.

Most critically, this Court should deny cert on this claim because Dotch did not clearly raise and properly present it to the Alabama Court of Criminal Appeals, and his failure to do so is a jurisdictional bar. Dotch simply argued to the lower court that his death sentence generally was contrary to *Ring*, emphasizing that *Ring* requires the jury to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, *not* that the jury is required to find the existence of each and every aggravating circumstance unanimously and beyond a reasonable doubt. Resp. App. 1a-3a. Notably, Dotch did not mention, much less address, the State's response to his *Ring*-based claims in his reply brief.

In denying relief on his *Ring*-based claims, the Alabama Court of Criminal Appeals reasoned as follows:

> Dotch argues that his sentence of death is due to be reversed pursuant to the holding in

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). He alleges that Alabama's capital-sentencing scheme is functionally identical to the scheme held to be unconstitutional in *Ring*, because the jury's verdict is not binding on the court. He further argues that Alabama's capital-sentencing scheme violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), by violating the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt.

In *Apprendi*, the United States Supreme Court held that a fact that increased a defendant's sentence beyond the statutory limits, other than the fact of a prior conviction, had to be found by a jury beyond a reasonable doubt. The Court then applied this holding to cases involving the death penalty in *Ring*, supra.

However, courts in Alabama have determined that Alabama's sentencing scheme is not unconstitutional under *Ring*, or *Apprendi* because the weighing process undertaken to arrive at a capital sentence is not a finding of fact or an element of the offense; therefore, a jury is not constitutionally required to weigh the aggravating and mitigating circumstances. *See Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002); *Beckworth v. State*, 946 So. 2d 490, 515 (Ala. Crim. App. 2005), cert. denied, 549 U.S. 1120, 127 S. Ct. 936, 166 L.Ed.2d 717

> (2007). Therefore this issue has already been determined adversely to Dotch's arguments.

Dotch, 2010 WL 1260162, at *59-60. Thus, the lower court understood Dotch to be arguing that Alabama's capital sentencing statute is unconstitutional, in light of *Ring*, because the jury's recommendation is not binding on the trial court and because the jury and the trial court are not required to find that the aggravating circumstances outweigh the mitigating beyond a reasonable doubt. *Id.*

In the face of the lower court's decision indicating that it understood him to have raised only those claims, Dotch did not argue in his rehearing application, as he was entitled to under Alabama law, that the Court had misperceived his *Ring*-based argument. *See* Ala. R. App. P. 40(a)(2)(B) ("The application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended."). Instead, Dotch just re-iterated his claims alleging that Alabama's capital sentencing statute is unconstitutional because the jury's recommendation is not binding on the trial court and because the jury and the trial court are not required to find that the aggravating circumstances outweigh the mitigating beyond a reasonable doubt. Resp. App. 4a-5a.

Likewise, in the petition for writ of certiorari that he filed in the Supreme Court of Alabama, Dotch raised those exact same *Ring*-based claims and made no mention of the claim that he now presents to this Court. Resp. App. 6a-7a.

Thus, the Alabama Court of Criminal Appeals did not address the claim that Dotch presents to this Court – whether the jury in a death penalty case is required to find the existence of each and every aggravating circumstance unanimously and beyond a reasonable doubt – because he failed to raise it in that court. This Court has long held that it will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646, 112 S. Ct. 1644, 1649 (1992). This case presents no reason to deviate from that rule. Because Dotch's claim was not preserved below, it should not be considered by this Court.

B. Certiorari Should Be Denied Because Resolving The Purported Split Will Not Affect The Outcome In Dotch's Case.

Dotch asks this Court to grant certiorari to determine whether, in light of *Ring*, a jury must determine, unanimously and beyond a reasonable doubt, the existence of every statutory aggravating circumstance on which a death sentence is based. Pet. at 6-9. Even assuming, *arguendo*, that there is a split among the state courts with regard to that question, this Court should deny cert because the resolution of the split will not affect the outcome in Dotch's case.

As explained below, that is so for two reasons. First, even if *Apprendi* and *Ring* required a jury determination of all aggravating circumstances beyond a reasonable doubt, the aggravating circumstances at issue here – both of which pertain to the fact of a prior conviction – fall within the

Almendarez-Torres exception to the *Apprendi/Ring* line of cases. Second and alternatively, even if this Court were to decide that *Apprendi* and *Ring* required submission of this fact to the jury, that holding would not affect the outcome in Dotch's case because any purported error on this front would have been harmless beyond a reasonable doubt.

1. *Apprendi* and *Ring* do not even arguably apply here because the fact at issue falls within the *Almendarez-Torres* exception.

As an initial matter, the purported split is irrelevant to this case because the aggravating circumstances at issue here fall within the ambit of this Court's decision in *Almendarez-Torres*. Under Alabama law, a defendant who has been convicted of a capital offense is not eligible for the death penalty unless and until at least one of the statutory aggravating circumstances that are enumerated in Ala. Code § 13A-5-49 is found to exist beyond a reasonable doubt. *Ex parte Waldrop*, 859 So. 2d 1181, 1187 (Ala. 2002) (citing Ala. Code § 13A-5-45(f)). Here, the State introduced two statutory aggravating circumstances, both of which pertained to Dotch's prior first-degree burglary conviction.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 243-245, 118 S. Ct. 1219, 1230-1231 (1998), this Court held that prior convictions do not have to be proven to a jury beyond a reasonable doubt, even where the finding of a prior conviction increases a defendant's sentence beyond that authorized by the jury's verdict. In reaching that result, this Court reasoned, in pertinent part, as follows:

> First, the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. Consistent with this tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information which alleges the elements of an underlying crime, even though the conviction was necessary to bring the case within the statute. That conclusion follow[s] ... from *the distinct nature of the issue*, and the fact that recidivism does not relate to the commission of the offense, *but goes to the punishment only*, and therefore ... may be subsequently decided. The Court has not deviated from this view.

Id. at 243-244, 118 S. Ct at 1230-1231 (emphasis in original) (internal quotation marks and citations omitted). Thus, this Court emphasized that questions related to recidivism traditionally have been decided by the sentencing court rather than the jury in holding that a trial court can elevate a defendant's sentence based solely on its finding that he has a prior conviction. *Id.*

This Court did not deviate from that rule in its decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). In *Apprendi*, this Court held that, "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. at 2362-2363 (emphasis added). In so ruling, this Court stated that it was not overruling

Almendarez-Torres. *Id.* at 488, 120 S. Ct at 2362. Indeed, this Court again held that a trial court has the authority to increase a defendant's sentence above that which is authorized by the jury's verdict based on a finding that the defendant has a prior conviction, reasoning:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

Id. According to this Court, that is all the more true where the defendant has "admitted" that he has a prior conviction. *Id.*

In *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443, this Court extended its holding in *Apprendi* to capital sentencing. Specifically, this Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial because it allowed "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* This Court concluded that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602, 122 S. Ct. at 2439. But, this Court did not eliminate the prior-conviction exception to that rule that was enunciated in *Almendarez-Torres*.

Critically, this Court stated the following with regard to the petitioner's claim:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

Id. at 597, n.4, 122 S. Ct. at 2437, n.4. Thus, *Ring* has no application to cases in which the only aggravating circumstances that led to the imposition of a death sentence are based on the defendant's prior conviction.

The question here, therefore, is whether Dotch's "maximum penalty" was "increase[d]" by some judicial finding of a fact "other than [a] prior conviction." *Ring*, 536 U.S. at 600, 122 S. Ct. at 2439 ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.") (quoting *Jones v. United States*, 526 U.S. 227, 243, n.6, 119 S. Ct. 1215, 1224, n.6 (1999)). Plainly, it was not.

The State argued that the following two statutory aggravating circumstances existed at the penalty phase of Dotch's trial: (1) the capital offense was committed by a person under sentence of imprisonment, pursuant to Ala. Code § 13A-5-49(1); and, (2) the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, pursuant to Ala. Code § 13A-5-49(2). (R. 1607-1610.) The aggravating circumstances were based on his September 27, 2004 guilty plea to the charge of first-degree burglary, for which he was placed on probation for five years. (C.R. 641.)

To satisfy its burden of proving the existence of those two aggravating circumstances, the State introducing a certified copy of the docket sheet pertaining to Dotch's first-degree burglary conviction. (R. 1465, 1492.) The docket sheet, which was admitted as State's Exhibit 50-B, contained the aforementioned information, and the State included the indictment charging him with that offense in that exhibit. (C.R. 638-652.) The indictment stated:

> Garrett Dotch ... did, on or about **September 1, 2003**, knowingly and unlawfully enter or remain unlawfully in the dwelling of **Timarla Taldon**, and while effecting entry or while in the dwelling or in immediate flight therefrom, the said **Garret Dotch** did cause physical injury to **Timarla Taldon**, to wit: **by striking her about the face with his fist**, in violation of § 13A-7-5 of the Code of Alabama.

(C.R. 652.) (emphasis in original).

Not surprisingly, the trial court, in its sentencing order, found that the State satisfied its burden of proving the existence of those aggravating circumstances beyond a reasonable doubt. (C.R. 560-561.) Significantly, the trial court further found that Dotch "does not challenge the existence" of either of the aggravating circumstances. (C.R. 560-561.) Thus, his prior first-degree burglary conviction, standing alone, rendered him death-eligible. And, for that reason, Dotch's death sentence does not implicate *Ring*.

Moreover, what Dotch seeks is the overruling of *Almendarez-Torres*, but he never mentions, much less addresses, that decision in his cert petition. For at least a decade, this Court has been bombarded with requests to scrap *Almendarez-Torres*, and this Court consistently has rejected those requests. *See, e.g.*, *James v. United States*, 550 U.S. 192, 214, n.8, 127 S. Ct. 1586, 1600, n.8 (2007) ("To the extent that James contends that the simple fact of his prior conviction was required to be found by a jury, his position is baseless. James admitted the fact of his prior conviction in his guilty plea, and in any case, we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes."). Indeed, Justice Stevens acknowledged that his view that *Almendarez-Torres* was decided incorrectly does not constitute a "sufficient reason" for re-visiting it:

> The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history, unlike the denial of a jury trial on other issues of fact that give rise to mandatory minimum sentences, will seldom

> create any significant risk of prejudice to the accused. Accordingly, there is no special justification for overruling *Almendarez-Torres*. Moreover, countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.

Rangel-Reyes v. United States, 547 U.S. 1200, 126 S. Ct. 2873 (2006) (statement of Justice Stevens respecting the denial of the petitions for writ of certiorari). This Court should, therefore, reject Dotch's implicit request that it revisit its own well-settled precedent and deny his cert petition. *See also United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007) ("Because the Supreme Court treats *Almendarez-Torres* as binding precedent, Pineda's argument is fully foreclosed from further debate.").

Apart from his disagreement with *Almendarez-Torres*, Dotch attempts to sow confusion in his cert petition by alleging that the trial court was required to hear "witness testimony" and consider additional facts to determine "whether his three-year sentence from March 2002 had fully run by the time of Ms. Taldon's death in July 2006, or whether the running of the sentence had been tolled." Pet. at 4, n.2. Quite simply, Dotch is mistaken.

Before the penalty phase of Dotch's trial began, the prosecutors advised the trial court that they planned to introduce a certified copy of a docket sheet reflecting that Dotch was convicted of the possession of a controlled substance in 2002 and was placed on three years of probation for that offense as

additional evidence to prove the existence of the aggravating circumstance that he was under a sentence of imprisonment on July 10, 2006, the day that he murdered Timarla Taldon. (R. 1431-1433.) After the trial court asked them whether Dotch's sentence for that offense had expired before the murder of Timarla, the prosecutors informed the court that they would call his probation officer to testify that his sentence had been tolled by his subsequent offenses in 2003 and, therefore, was still in place at the time of her death. (R. 1433-1434.) But, the prosecutors apparently reversed course because they did not call his probation officer or even once mention Dotch's 2002 felony drug conviction during the State's penalty phase case-in-chief.

During the penalty phase charge conference, the trial court suggested that Dotch could argue that the statutory mitigating circumstance that the defendant has no significant history of prior criminal activity, pursuant to Ala. Code § 13A-5-51(1), existed in his case. (R. 1469.) Upon hearing that statement, the prosecutors informed the court that they intended to introduce a certified copy of the docket sheet reflecting Dotch's 2002 felony drug conviction for the limited purpose of rebutting that statutory mitigating circumstance. (R. 1477-1479.) His counsel then replied that they were not going to rely on that statutory mitigating circumstance, and based on that information, the trial court expressly forbade the prosecutors from making any reference to his 2002 drug conviction. (R. 1480, 1488.) And, the record reveals that the jurors never were informed about that conviction.

In short, the trial court's finding that the State satisfied its burden of proving the existence of Dotch's prior first-degree burglary conviction beyond a reasonable doubt, by itself, rendered him death-eligible. In fact, Dotch, just like the petitioner in *Almendarez-Torres*, did not contest the existence of that prior conviction. For that reason, Dotch's death sentence does not implicate *Ring*, and this Court accordingly should deny cert because any answer to the question of whether a jury must determine, unanimously and beyond a reasonable doubt, the existence of each and every statutory aggravating circumstance on which a death sentence is based will not affect the outcome of his case.

2. Any asserted error would be harmless in Dotch's case.

Moreover, even if this case somehow fell outside the ambit of *Almendarez-Torres*, this Court's resolution of the question presented would not affect the outcome in Dotch's case because any asserted *Ring* error here would have been harmless beyond a reasonable doubt. This Court has found that the failure to treat a fact as an element of the crime can be deemed harmless if "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999). That was the case here, for the trial court specifically found that Dotch did not contest the existence of the conviction at issue. Accordingly, even if there had been *Ring* error here, it would have been harmless, and granting certiorari on this question would not affect the outcome in Dotch's case.

Conclusion

For the foregoing reasons, this Court should deny Garrett Dotch's petition for writ of certiorari.

Respectfully submitted,

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May 18, 2011

APPENDIX

Brief of the Appellant to the Court of Criminal Appeals – Issue XVII 1a

Application for Rehearing of Appellant Garrett Dotch and Brief in Support of Application for Rehearing – Issue XVII 4a

Petition for a Writ of Certiorari – Section C 6a

IN THE COURT OF
CRIMINAL APPEALS OF ALABAMA

GARRETT DOTCH, Appellant,	)	
v.	)	No. CR-07-1913
STATE OF ALABAMA, Appellee.	)	

BRIEF OF THE APPELLANT
(June 9, 2009)

XVII. *RING V. ARIZONA* COMPELS REVERSAL OF MR. DOTCH'S DEATH SENTCE.

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court held that facts necessary to sentence a defendant to death must be found by the jury beyond a reasonable doubt. The Court rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. *See id.* at 602-03 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.").

Alabama's capital sentencing scheme is functionally identical to the scheme struck down in *Ring* and fails constitutional muster for the same reasons. After the sentencing hearing, the jury returns an advisory verdict that "is not binding on the court." Ala. Code § 13A-5-47(e) (1975). The judge, without knowing which aggravating and mitigating factors the jury found to exist, must independently determine whether any aggravating circumstances outweigh any mitigating

circumstances. *Id.* Thus, it is the trial judge, not the jury, who determines whether the defendant receives a death sentence. *See Ex parte Hays*, 518 So. 2d 768, 775 (Ala. 1986) ("[T]he judge, and not the jury, is the final sentencing authority."); *Bush v. State*, 431 So. 2d 555, 559 (Ala. Crim. App. 1982) (the trial court "is in no way bound by the jury's recommendation concerning sentence").

This system is functionally identical to the one struck down in *Ring*. At the critical stage, the determination of whether aggravating factors outweigh mitigating factors and whether death is warranted is made not by the jury, but by a judge. A judge sitting alone cannot make this determination, which exposes the defendant to a greater punishment – death. *See Ex parte Waldrop*, 859 So. 2d 1181, 1197 (Ala. 2002) (Lyons, J., concurring in part and dissenting in part) ("'Facts that expose the defendant to a punishment greater than that otherwise legally prescribed'" constitute a separate offense and must be found by a jury (quoting *Harris v. Unites States*, 536 U.S. 545, 576 (2002) (Thomas, J., dissenting))). "[T]he Supreme Court has consistently returned to the bedrock principle that criminal sentences must be 'authorized' by 'the jury verdict alone.'" *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring) (citations omitted).

Alabama's capital sentencing scheme also violates the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Because Alabama does not permit juries to indicate or specify which, if any,

aggravating circumstances were found, *see e.g.*, *Ex parte McGriff*, 908 So. 2d 1024, 1039 (Ala. 2004) (proposed verdict form), the record precludes review of whether there was a reliable basis for imposition of a death sentence. Moreover, neither the judge nor the jury is required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, as required by *Apprendi*. *Waldrop*, 859 So. 2d at 1188-89 (aggravating factors need not outweigh mitigating factors beyond a reasonable doubt). Alabama's capital sentencing scheme violates Mr. Dotch's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Alabama law.

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

GARRETT DOTCH, Appellant,	)	
v.	)	No. CR-07-1913
STATE OF ALABAMA, Appellee.	)	

APPLICATION FOR REHEARING OF APPELLANT GARRETT DOTCH AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

(April 30, 2010)

XVII. THE COURT ERRED IN FAILING TO FIND THAT *RING V. ARIZONA* COMPELS REVERSAL OF MR. DOTCH'S DEATH SENTENCE.

This Court erred by rejecting Mr. Dotch's argument that *Ring v. Arizona*, 536 U.S. 584, 609 (2002), compels the reversal of his death sentence. Opinion at *59. As the Court recognized, the Supreme Court in *Ring* held that the facts necessary to sentence a defendant to death must be found by the jury beyond a reasonable doubt. The Court rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. *See id.* at 602-03 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."). As Mr. Dotch argued, Alabama's capital sentencing scheme is functionally

identical to the scheme struck down in *Ring* and is unconstitutional for the same reasons.

Alabama's capital sentencing scheme also violates the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Neither the judge nor the jury is required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, as required by *Apprendi*. Therefore, this Court should reconsider Mr. Dotch's argument that Alabama's capital sentencing scheme violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Alabama law.

Mr. Dotch incorporates his arguments on pages 113-16 of his opening brief.

IN THE SUPREME COURT OF ALABAMA

GARRETT DOTCH, Petitioner,	)	
v.	)	No. 1091264
STATE OF ALABAMA, Respondent.	)	

PETITION FOR A WRIT OF CERTIORARI

(August 13, 2010)

C. *Ring v. Arizona* Compels Reversal Of Mr. Dotch's Death Sentence

The reversal of Mr. Dotch's death sentence is compelled by *Ring v. Arizona*, 536 U.S. 584 (2002), where the Supreme Court held that the facts necessary to sentence a defendant to death must be found by the jury beyond a reasonable doubt. The Court in *Ring* rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. *See id.* at 602-03 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."). As Mr. Dotch has argued, Alabama's capital sentencing scheme is functionally identical to the scheme struck down in *Ring* and is unconstitutional for the same reasons.

Due to the conflict of Alabama's capital sentencing scheme with U.S. Supreme Court precedent, this Court should grant certiorari pursuant to Rule 39(a)(1)(D), (a)(2)(A) of the Alabama Rules of Appellate Procedure.

Alabama's capital sentencing scheme also violates the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Neither the judge nor the jury in Alabama is required to find that the aggravating circumstances outweigh the mitigating circumstances *beyond a reasonable doubt*, as required by *Apprendi*. Therefore, this Court should find that Alabama's capital sentencing scheme violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Alabama law. Therefore, the Court should grant a writ of certiorari pursuant to Rule 39(a)(1)(D), (a)(2)(A).

RECORD AND BRIEFS

No. 10-1270

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

GARRETT DOTCH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. MR. DOTCH'S CLAIM WAS PROPERLY RAISED AND PRESERVED BELOW. 2

II. GRANTING MR. DOTCH'S PETITION WOULD NOT REQUIRE THE COURT TO ADDRESS THE CONTINUED VALIDITY OF THE ALMENDAREZ-TORRES EXCEPTION 5

A. The Aggravating Factors at Issue in Mr. Dotch's Case Go Beyond the Mere Fact of His Prior Conviction. 5

B. Even if *Almendarez-Torres* Were as Broad as the State Claims, It Could Not Apply in Mr. Dotch's Case in Light of the Trial Record 7

III. THE STATE'S CONTENTION THAT MR. DOTCH "DID NOT CHALLENGE" THE TRIAL COURT'S FINDINGS IS A RED HERRING. 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES — PAGE

Almendarez-Torres v. United States,
523 U.S. 224 (1998) ..... *passim*

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... *passim*

Bankers Life & Cas. Co. v. Crenshaw,
486 U.S. 71 (1988) 4

Blakely v. Washington,
542 U.S. 296 (2004) 6, 10

Cunningham v. California,
549 U.S. 270 (2007) 11

Dewey v. Des Moines,
173 U.S. 193 (1899) 4

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 4

Neder v. United States,
527 U.S. 1 (1999) 9, 10

Ring v. Arizona,
536 U.S. 584 (2002) ..... *passim*

Shepard v. United States,
544 U.S. 13 (2005) 6, 7, 8, 9

United States v. Booker,
543 U.S. 220 (2005) 6

Washington v. Recuenco,
548 U.S. 212 (2005) 5

Yee v. Escondido,
503 U.S. 519 (1992) 4

TABLE OF AUTHORITIES—CONTINUED

STATUTES PAGE

Ala. Code § 13A-5-49(1) 6

Ala. Code § 13A-5-49(2) 6

CONSTITUTIONAL AMENDMENTS

Fourteenth Amendment 2

Eighth Amendment 2

Sixth Amendment 2

IN THE

Supreme Court of the United States

No. 10-270

GARRETT DOTCH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

It is striking (and very telling) how little the State has chosen to say about the actual merits of Mr. Dotch's request for certiorari. The State cannot dispute that there is a split of authority among seven state supreme courts on the question presented[1] and so instead the State attempts to divert this Court's focus to procedural issues and exceptions that supposedly render Mr. Dotch's case the wrong vehicle for resolving the split. As discussed below, however, none of the State's arguments has any merit.

[1] The best response the State can muster is that Mr. Dotch may have "exaggerated" the split. Resp't Br. at 8-9. Not so. The opinions of the lower courts speak for themselves.

Mr. Dotch's case is an ideal vehicle for resolving a clear split of authority concerning the nature of the jury's role in capital sentencing. The rights in question are fundamental, and the stakes could not be higher. By its silence, the State essentially concedes its inability to contest these propositions.

Mr. Dotch's sentence of death would be held unconstitutional in at least four States, yet has been permitted by Alabama. This conflict in the lower courts cries out for resolution.

Because the State has not engaged on the larger issues, in the remainder of this reply brief we will demonstrate that the State is wrong when it contends that Mr. Dotch's case does not squarely present the *Apprendi/Ring* issue that has bedeviled the lower courts.

I. MR. DOTCH'S CLAIM WAS PROPERLY RAISED AND PRESERVED BELOW.

The State argues in its opposition brief that Mr. Dotch's claim was not raised and preserved in the lower courts. *See* Resp't Br. at 9-12. This contention is without merit. Mr. Dotch has maintained at every stage of his trial and appellate proceedings that Alabama's hybrid death penalty sentencing scheme violates *Apprendi* and *Ring* because it allows the trial judge, not the jury, to find and weigh facts which are necessary to support a death sentence.

Before his trial, Mr. Dotch moved to bar imposition of the death penalty on the ground that Alabama's sentencing scheme "permits the judge, not the jury, to make the factual findings necessary to expose the defendant to the death penalty," in violation of "the Sixth, Eighth and Fourteenth Amendments to the

United States Constitution." (C.R. 251).[2] In support of the motion, Mr. Dotch specifically argued (among other things) that:

> 14. The determination of whether the aggravating circumstances(s) exist beyond a reasonable doub[t] *and* whether the aggravating circumstance(s) outweighs the mitigating circumstance(s) are findings of "fact on which the legislature conditions an increase in [the] maximum punishment," and as such must be found to exist by a unanimous jury beyond a reasonable doubt. *Ring*, 122 S. Ct. at 2432.
>
> 15. Only the judge makes these factual findings under the current Alabama [death penalty] statute; therefore, the statute is unconstitutional.

(C.R. 256) (emphasis in original). Following his conviction and sentence, Mr. Dotch moved for a new trial on the ground that:

> The Alabama capital sentencing scheme is unconstitutional under *Ring v. Arizona*, specifically in that it does not require the jury to find unanimously the facts supporting a capital sentence.

Pet'r App. at 175a.

In support of his *Apprendi/Ring* claim before the Alabama Court of Criminal Appeals, Mr. Dotch argued that:

> In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court held that facts necessary to sentence a defendant to death must be found by

---

[2] The abbreviation "C.R ___" refers to the clerk's record on direct appeal.

> the jury beyond a reasonable doubt. The Court rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. . . .
>
> Alabama's capital sentencing scheme is functionally identical to the scheme struck down in *Ring* and fails constitutional muster for the same reasons.

Resp't App. at 1a (internal citations omitted). Mr. Dotch repeated these contentions in support of his application for rehearing before the Court of Criminal Appeals (Resp't App. at 4a-5a), and in his petition to the Supreme Court of Alabama for a writ of certiorari (Resp't App. at 6a).

Given the record, the notion that Mr. Dotch failed to preserve his claim is meritless. To be sure, Mr. Dotch's instant petition further elaborates on the reasons why Alabama's hybrid sentencing scheme cannot be squared with *Apprendi* and *Ring*. But this Court's precedents make clear that a petitioner may offer any argument – even a new one – in support of a valid claim. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (internal references omitted); *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (same); *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899).

In contending otherwise, the State incorrectly conflates "arguments" with "claims." *See Yee*, 503 U.S. at 534-35. Mr. Dotch's petition is based on the same

claim he has been making since before his conviction and death sentence, *i.e.*, that Alabama's sentencing scheme unconstitutionally usurps the fact-finding role of the jury.

II. GRANTING MR. DOTCH'S PETITION WOULD NOT REQUIRE THE COURT TO ADDRESS THE CONTINUED VALIDITY OF THE ALMENDAREZ-TORRES EXCEPTION.

A. The Aggravating Factors at Issue in Mr. Dotch's Case Go Beyond the Mere Fact of His Prior Conviction.

The State contends that Mr. Dotch's petition amounts to an implicit request for the Court to overturn the *Almendarez-Torres* "prior conviction" exception to *Apprendi* and *Ring*. *See* Resp't Br. at 18. A clear-eyed look at the narrow scope of the exception and the record below quickly dispels this contention.

The State maintains that the *Almendarez-Torres* exception applies to Mr. Dotch's case because both of the aggravating factors at issue "relate" or "pertain" to his prior conviction for first degree burglary. Resp't Br. at 12-21. But this Court has never held that the exception extends to facts *relating or pertaining* to a "prior conviction." Instead, the Court has repeatedly and consistently stated that the reach of the *Almendarez-Torres* exception is limited to the "fact of a prior conviction" itself. *See Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000) ("The Constitution requires that *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to the jury and proved beyond a reasonable doubt.") (emphasis added); *see also Washington v. Recuenco*, 548 U.S. 212, 212 (2005) ("other than the

fact of a prior conviction"); *United States v. Booker*, 543 U.S. 220, 220 (2005) (same); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (same); *Ring v. Arizona*, 536 U.S. 584, 600 (2002) (same).

As discussed in Mr. Dotch's petition (at 3-4), the trial judge found and weighed two aggravating factors in imposing his death sentence: (1) that Mr. Dotch was under a sentence of imprisonment at the time of Ms. Taldon's death, Ala. Code § 13A-5-49(1); and (2) that Mr. Dotch had been previously convicted of a felony that involved the use or threat of violence to a person, Ala. Code § 13A-5-49(2). In finding these aggravators to exist, the trial court had to look beyond the mere "fact of the prior conviction" itself to consider subsidiary facts about the nature of the prior crime and the status of Mr. Dotch's prior sentence.

This Court's precedents establish that those subsidiary facts are within the province of the jury, not the sentencing judge. *See Shepard v. United States*, 544 U.S. 13, 25 (2005) (clarifying that the *Almendarez-Torres* exception does not allow a sentencing judge to resolve "any fact that can be described as a fact *about* a prior conviction") (emphasis added); *Apprendi*, 530 U.S. at 487 (cautioning that the *Almendarez-Torres* exception "represents at best an exceptional departure" from the Court's sentencing jurisprudence).

In short, in its effort to evade Supreme Court review, the State has mischaracterized *Almendarez-Torres* and erroneously suggested that its scope extends well beyond the fact of a prior conviction.

B. Even if *Almendarez-Torres* Were as Broad as the State Claims, It Could Not Apply in Mr. Dotch's Case in Light of the Trial Record.

Furthermore, even if the *Almendarez-Torres* exception were as broad as the State claims (and it is not), the State could not invoke the exception against Mr. Dotch in light of the record below. As set forth in the State's opposition brief (at 17), "To satisfy its burden of proving the existence of [the] two aggravating circumstances, the State introduced a certified copy of the *docket sheet* pertaining to Dotch's first-degree burglary conviction." (emphasis added). This Court has never held that a judge can rely on a docket sheet in considering sentencing enhancements relating to prior crimes, especially in a capital case.

To the contrary, in *Shepard v. United States*, 544 U.S. 13 (2005), the Court limited the "evidentiary cast" of records available to the judge to "conclusive records made or used in adjudicating [prior] guilt." *Id.* at 21. This is in keeping with the Court's "demand for certainty" regarding the factual basis for any prior guilty plea considered during sentencing. *Id.*

Accordingly, a sentencing judge may look only to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. The judge may not consider police reports (*id.* at 16), complaint applications (*id.*), or, presumably, docket sheets, all of which lack the inherent "certainty" or "conclusive significance" essential to any

application of the narrow *Almendarez-Torres* exception. *See id.* at 25.

The significance of this limitation on what the judge may rely on for this purpose is underscored by the record in Mr. Dotch's case. The docket sheet that the State offered in evidence indicates that he pled guilty to "burglary in the first degree," without reference to any particular code section under Alabama statute. (C.R. 641). As the trial court observed, the crime of burglary in the first degree under Alabama law does not necessarily involve a use or threat of violence to any person. (R. 1523-24, 1556-59).[3]

Hence, the docket sheet alone could not be relied on by the court to establish that Mr. Dotch had been previously convicted of a felony involving a "use or threat of violence to a person."[4] Nor did the State introduce a written plea agreement, transcript of plea colloquy, or any other evidence that would conclusively establish the facts to which Mr. Dotch admitted when he pled guilty to burglary. *Contrast Almendarez-Torres*, 523 U.S. 224, 226 (1998) (indicating that a transcript of the plea colloquy served as the basis for trial court's findings regarding defendant's prior conviction). Therefore, even if the State were correct that the "prior conviction" exception *could apply* in certain cases involving one or more of the aggravating circumstances at issue here, the

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[3] The abbreviation "R ___" refers to the reporter's transcript on direct appeal.

[4] In an effort to fill this "gap" in the record during sentencing, the trial court allowed the State to supplement the docket sheet exhibit with a copy of Mr. Dotch's April 22, 2004 indictment (R. 1556-59, C.R. 652). But the indictment establishes only what Mr. Dotch was accused of, not the facts to which he pled guilty.

exception *cannot apply* in this case in light of the record below.

In summary, the State's argument misconstrues both the scope of the *Almendarez-Torres* exception and its application. The exception does not apply here.[5]

III. THE STATE'S CONTENTION THAT MR. DOTCH "DID NOT CHALLENGE" THE TRIAL COURT'S FINDINGS IS A RED HERRING.

The State further contends that any constitutional error in this case would be "harmless" because Mr. Dotch "did not contest" the sentencing judge's findings with respect to the existence of the two aggravating circumstances proffered by the State. Resp't Br. at 21. This argument is a red herring for several reasons.

First, Mr. Dotch has maintained consistently since before his trial that it is a violation of the Constitution (and this Court's precedents) for Alabama judges

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[5] The continued validity of the *Almendarez-Torres* exception has long been in doubt. *See Apprendi*, 530 U.S. at 489 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided. . . ."); *see also Shepard*, 544 U.S. at 27 ("[*Almendarez-Torres*] has been eroded by this Court's subsequent Sixth Amendment jurisprudence and a majority of the Court now recognizes that [it] was wrongly decided.") (Thomas, J., concurring in part and concurring in judgment). For the reasons above, however, the State is wrong to suggest that granting Mr. Dotch's petition would oblige the Court to address this issue. The question presented is narrowly limited to whether a defendant has a constitutional right to have a jury (as opposed to a judge) determine the existence of all aggravating circumstances on which a death sentence is based.

independently to find aggravating circumstances to exist and then rely on their own findings (instead of the jury's) to impose death. *See supra* Heading I. Therefore, it is of no moment whether trial counsel specifically "challenged" or "contested" written findings made by the judge after the jury had rendered its advisory recommendation. Both before and after trial, counsel challenged whether it was constitutional for the judge to making *any such findings at all*. *See supra* Heading I.

Second, this Court has indicated that to forfeit or waive *Apprendi/Ring* rights, a defendant must either stipulate to the relevant facts or consent to judicial fact-finding. *See Blakely*, 542 U.S. at 310. Mr. Dotch did nothing of the kind. Accordingly, he preserved his "absolute entitlement" to a jury trial on all of the elements of his charge (including the two aggravating circumstances proffered by the State to render him death-eligible). *See Apprendi*, 530 U.S. at 497 ("The person who is charged with actions that expose him to the death penalty has an *absolute entitlement* to [a] jury trial on all the elements of the charge.") (emphasis added and internal referenced omitted); *Ring*, 536 U.S. at 602 ("All the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury) (emphasis in original and internal references omitted).

Finally, even if the State's argument had some merit (and it has none), the Court's precedents make clear that now is not the time to take up questions of harmless error. This Court "ordinarily leaves it to the lower courts to pass on the harmlessness of error in the first instance." *Ring*, 536 U.S. at 609 n. 7 (internal references omitted); *see also Neder v. United*

States, 527 U.S. 1, 25 (1999) (same). Thus, consistent with the *Ring* precedent, the Court should address the merits of Mr. Dotch's petition before remanding for further proceedings not inconsistent with its opinion. *See Ring*, 536 U.S. at 609 n.7 (expressly declining to address Arizona's harmless error argument and remanding for further proceedings). *Accord Cunningham v. California*, 549 U.S. 270, 294 (2007) (overturning California's determinate sentencing law on *Apprendi* grounds and remanding for further proceedings).

CONCLUSION

For the reasons set forth above and in Mr. Dotch's petition, the writ should issue.

Respectfully submitted,

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